FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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No reviews were filed in which a Denial was issued.

MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. PENN 81-96-R
and	:	
UNITED MINE WORKERS OF AMERICA	:	
v.	:	
JONES & LAUGHLIN STEEL CORPORATION	:	

DECISION

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. V 1981), and involves the interpretation of the mandatory safety standard contained in section 303(d)(1) of the Act, 30 U.S.C. § 863(d)(1)(1976), and the identical implementing standard, 30 C.F.R. § 75.303. 1/ For the reasons that

1/ Section 303(d)(1) of the Mine Act, and 30 C.F.R. § 75.303, provide in part:

> [1] Within three hours immediately preceding the beginning of any shift, and before any miner in such shift enters the active workings of a coal mine, certified persons designated by the operator of the mine shall examine such workings and any other underground area of the mine designated by the Secretary or his authorized representative. [2] Each such examiner shall examine every working section in such workings and shall make tests in each such working section for accumulations of methane with means approved by the Secretary for detecting methane and shall make tests for oxygen deficiency with a permissible flame safety lamp or other means approved by the Secretary; examine seals and doors to determine whether they are functioning properly; examine and test the roof, face, and rib conditions in such working section; examine active roadways, travelways, and belt conveyors on which men are carried, approaches to abandoned areas, and accessible falls in such section for hazards; test by means of an anemometer or other device approved by the Secretary to determine whether the air in each split is traveling in its proper course and in normal volume and velocity; and examine for such other hazards and violations of the mandatory health or safety standards, as an authorized representative of the Secretary may from time to time require. [3] Belt conveyors on which coal is carried shall be examined after each coal-producing shift has begun. [Sentence numbers added.]

around belt conveyors are "active workings," and subject to some form of inspection under the first sentence of the standard, because that issue was not litigated below.

On February 17, 1981, Jones & Laughlin Steel Corporation was issued a citation under section 104(d)(1) of the Mine Act alleging that it had violated 30 C.F.R. § 75.303 by not pre-shift examining certain coal-carrying conveyor belt "flights"--that is, sections of the conveyor beltline system. See Bureau of Mines, U.S. Dept. of the Interior, A Dictionary of Mining Mineral, and Related Terms 440 (1968). On February 19, 1981, an order of withdrawal was issued under section 104(d)(1) for another alleged failure to pre-shift coal-carrying conveyor belt flights. On both occasions miners had entered the area where the beltlines were located and begun working before an examination of the beltline had been conducted. Jones & Laughlin's Vesta No. 5 Mine, where the citation and order were issued, is an underground coal mine in which coal haulage is accomplished largely by a conveyor belt system.

Jones & Laughlin contested the citation and order and a hearing was held before a Commission administrative law judge. At the hearing, Jones & Laughlin and the Secretary of Labor stipulated that the belts in question carried coal, not persons, and that coal was produced on the shifts during which the citation and order were written. The parties also agreed that an examination "of the nature specified in 30 C.F.R. § 75.303" was made, but was not conducted within three hours preceding the beginning of the shift, or before miners entered and began to work in the areas cited. The belt conveyors were stipulated to be in "good condition" at the time of the citation and withdrawal order. 3/

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footnote 1 cont'd.

Further, section 318(g) of the Mine Act and the Secretary's standards identically define key terms used in section 303(d)(1):

> "[W]orking section" means all areas of the coal mine from the loading point of the section to and including the working faces,
>
> "active workings" means any place in a coal mine where miners are normally required to work or travel.

30 U.S.C. § 878(g)(3) and (4); 30 C.F.R. § 75.2(g)(3) and (4).

2/ The judge's decision is reported at 3 FMSHRC 1721 (July 1981)(ALJ).

shift examined under the first sentence of the standard, and that the third sentence requires a separate on-shift examination. The UMWA further asserts that these two examinations cannot be combined. As discussed below, we reject the UMWA's position that the conveyor belt equipment at issue is, in and of itself, an active working. Given our disposition of this case, we need not address the UMWA's other assertions.

The Secretary's position is more involved. He does not argue that coal-carrying beltlines are "active workings." Further, he concludes, as we do, that there is no requirement that coal-carrying belt equipment be pre-shift inspected. Br. 10-13. He argues, however, that section 303(d)(1) does require a pre-shift examination of all areas in coal-carrying conveyor belt entries where miners will be assigned to work on the upcoming shift. The Secretary asserts that, when examining belts on-shift, both the entry and the belt must be examined if the entry has not been pre-shift inspected. The Secretary would allow these two inspections to be merged in certain circumstances.

The Secretary thus asks us to decide whether the areas surrounding the coal-carrying belt equipment must be pre-shift inspected under the first sentence of the standard, which refers to "active workings." After careful examination of the record, we are satisfied that the Secretary did not present to the judge this complex argument distinguishing between the belt equipment and the entries in which the equipment is located. Further, the citation and order in this case both refer to "conveyor belt flights"--as noted above, specific sections of conveyor belt equipment. In short, the Secretary failed to litigate below the argument he now asks us to review. As a result, we have an incomplete and unsatisfactory record on this important question. Similarly, the judge did not decide this issue, and his opinion does not contain any discussion of a distinction between belt

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4/ The American Mining Congress, Bituminous Coal Operators Association, and Keystone Bituminous Coal Association filed briefs as amici curiae. Keystone Bituminous Coal Association in its amicus brief requested that the Commission issue a declaratory order to the Secretary requiring him to publish his interpretive and policy memoranda regarding 30 C.F.R. § 75.303 in the Federal Register. An amicus curiae cannot control the course of litigation and, generally, may not request relief. See, for example, Bing v. Roadway Express, Inc., 485 F.2d 441, 452 (5th Cir. 1973); 1B J. Moore, T. Currier, Moore's Federal Practice ¶0.411[6] (2d ed. 1982). Keystone lacks standing to make this request, and therefore

been demonstrated. 5/

Under these circumstances, our decision concerns only coal-carrying belt equipment, which is specifically treated in the third sentence of section 303(d)(1), and which the Secretary agrees need not be pre-shifted. We interpret the judge's decision as referring to belt equipment only, and reject any reading to the contrary. If the Secretary wishes to litigate the question of whether coal-carrying beltline entries must be pre-shifted, he should in a future case issue a citation and file pleadings and briefs clearly raising that issue. We now turn to the narrow question before us.

The inspection requirements imposed by section 303(d)(1) are to be determined by reading that section as a whole. Elementary principles of statutory construction require that the individual inspection requirements be read in an harmonious and consistent manner. Philbrook v. Glodgett, 421 U.S. 707, 713 (1975). See 2A Sands, Sutherland Statutory Construction § 46.05 (4th ed. 1973). The first sentence of section 303(d)(1), which requires pre-shift inspection of "active workings," is the most general of the three sentences. Thereafter, Congress proceeded to impose more particular inspection requirements. In the second sentence of that section, Congress required pre-shift examination of "working sections," a less inclusive area than "active workings." In the second sentence, Congress also specifically mandated inspections of particular areas and objects in underground mines, e.g., seals and doors, roofs, faces, and ribs, and active roadways, travelways, "and belt conveyors on which men are carried ..." (Emphasis added.) Finally, in the third sentence Congress specifically directed, "Belt conveyors on which coal is carried shall be examined after each coal-producing shift has begun." (Emphasis added.)

Based on the structure of section 303(d)(1), as well as on the definition of "active workings" in section 318(g)(3)(quoted in n. 1 above), we first conclude, in agreement with the Secretary, that coal-carrying equipment per se is not an active working. Active

5/ Indeed, we note that the Secretary's position has evolved through several stages. The judge held below that the Secretary had no "consistent or coherent construction of the section in controversy" and was "unable to cite any written policy or procedure" describing his interpretation of the standard at issue. 3 FMSHRC at 1733. The Secretary's current position was not refined and clarified until his reply brief to us in this case and was not announced to the public

of areas surrounding the belt equipment are active workings.

Further, in section 303(d)(1), Congress distinguished between coal-carrying beltlines and those that carry miners. Congress in the second sentence of the standard required pre-shift inspection of man-carrying belts, and, in the third sentence, required on-shift inspection of coal-carrying belts. These discrete references to different belt functions, and clear differences in inspection requirements, demonstrate congressional knowledge of the operation and use of conveyor belt systems in coal mines. Given this evident congressional understanding and the specific inspection requirements imposed as to each type of conveyor belt system, we conclude that coal-carrying conveyor belts do not have to be pre-shifted.

Our construction of section 303(d)(1) is supported by the legislative history. Section 303(d)(1) of the Mine Act was adopted without change from the 1969 Coal Act, and the legislative history of the Mine Act does not discuss this section. Accordingly, we look to the legislative history of the 1969 Coal Act and the intent of the original promulgators of this section. Section 303(d)(1) of the 1969 Coal Act was a revision of a 1952 Coal Act inspection provision that did not expressly mention beltlines. See section 209(d)(7) of the 1952 Coal Act, 30 U.S.C. § 471 et seq. (1964)(repealed 1969).

In the process of amending the provisions of the 1952 Act, the Senate passed a bill that provided in part that "all belt conveyors" shall be pre-shift examined. S. 2197, 91st Cong., 1st Sess. § 204(d)(1)(1969) reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Legislative History of the Federal Coal Mine Health and Safety Act of 1969, Part 1 at 315-16 (1975) ("Legis. Hist."). The bill to amend the 1952 Act that passed the House required pre-shift examination of "all belt conveyors on which men are carried"; it also contained a sentence not found in the Senate version: "Belt conveyors on which coal is carried shall be examined after each coal-producing shift has begun." H.R. 13950 § 303(d)(1), Legis. Hist., Part 1 at 1417.

The Conference Committee adopted neither all of the Senate version nor all of the House version. Instead, a hybrid provision appearing in the Conference Report was enacted as section 303(d)(1) of the Coal Act, and was re-enacted as section 303(d)(1) of in the Mine Act. Legis. Hist., Part I at 1470-71; section 303(d)(1) of the Mine Act (quoted above, n. 1). The statutory standard enacted by Congress adopted the House language requiring pre-shift examination of conveyor belts that carry

3 FMSHRC at 1732-33. Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 199-200 (1974). 7/

For the foregoing reasons, we hold that section 303(d)(1) does not require pre-shift inspection of coal-carrying beltlines. Rather, that belt equipment must be examined, pursuant to the third sentence of section 303(d)(1), "after each coal producing shift has begun." We leave for another day the question of whether entries in which coal-carrying beltlines are located must be pre-shift inspected. 8/

Accordingly, on the bases explained above the judge's decision is affirmed and the citation and withdrawal order are vacated.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

L. Clair Nelson, Commissioner

7/ Further evidence of congressional intent is found in the section-by-section analysis and explanation presented by Senator Williams, a conferee and manager of the bill, to the Senate on its debate on the bill that became the 1969 Coal Act. Concerning section 303(d), this analysis states:

> Subsection (d) sets forth requirements that the operator must follow for preshift examinations. This [sic] provisions are similar to the 1952 act provisions, ... except for several additional requirements including ... an examination of belt conveyors on which men are carried before each shift, [and] an examination of coal carrying belt conveyors after each shift begins....

Legis. Hist., Part I at 1610 (emphasis added). This explanation by a key conferee also clearly indicates that Congress distinguished between conveyor belts that carry persons and those that carry coal, and that Congress intended that inspections of coal-carrying belts occur after

Plato observed that "The life which is unexamined is not worth living." Bartlett's Familiar Quotations 93 (14th ed. 1968). The mine which is unexamined, however, may snuff the life and moot its examination Progress in the two millenia since Plato has been hard won, but one would hope we have advanced beyond requiring helots to face the perils of an uninspected mine.

The majority nevertheless is determined to avoid deciding whether the uninspected entries in which these miners were working, and in which these coal carrying conveyor belts were located, are active workings, and therefore subject to preshift inspection. I find this misdirected diligence to be extraordinary given the operator's concession that these are active workings 1/ and since this is the central issue before us, on which the Secretary's and UMW's appeals are premised.

The situation here presented is one of frequent, indeed, daily repetition, at virtually every coal mine in the nation, and my colleagues decision fails to provide future guidance for the industry, the miners, and the Secretary.

The assertion that the question of "...whether the areas surrounding the coal carrying belt equipment must be preshift inspected..." was not presented by the Secretary to the judge below is simply wrong. Slip op. at 3. Contrary to the majority's determination, the language of the citation, withdrawal order, and action to terminate was directed towards this operator's failure to preshift examine the mine entry or area in which the equipment was located. 2/ Indeed, in my view, a violation is established whether or not the citation was of the area, or the area with the equipment therein, so long as the mine entry or area was part of the cited locale. Here, of course, there is no dispute that this area was not preshift examined. Tr. 7.

The citation stated:

> Evidence indicated that the A, B, and C conveyor belt flights of 44 Face had not been preshift examined for the day shift. An entry was not in the mine examiner's report or at the date board along the belt flights indicating that an examination was made before workmen of the day shift entered the area along each belt flight. [Emphasis added.]

(February 17, 1981) and order (February 19, 1981) contained the following statements:

> b. MSHA not only can cite an explicit requirement of 30 CFR 75.303 which mandates preshift examinations of conveyor belt (and other) entries regardless of the transportation of men, it can show that this requirement was the basis for the issuance of the subject citation and order.
>
> c. The holding of the Consol case specifically dealt with on-shift examination, and therefore is not advisory precedent for this case where the material issue centers upon preshift examinations of areas where miners are required to work or travel. [Emphasis added.]

See also Tr. 40, 47 (testimony of Inspector Beck).

The issue of failing to preshift the areas cited where miners were observed working along coal carrying belts was also presented to the administrative law judge by the Secretary. In his post hearing brief to the judge, the Secretary argued:

> At the outset, the Secretary reiterates that "the material issue centers on preshift examinations of an area where miners are required to work or travel" (Tr. 30).

Secretary's post hearing brief at 8.

> J & L urges this proposition while admitting that the areas involved in the citation and order were not only in belt entries, but were also active workings (Tr. 18-19).

Id. at 9.

> The construction urged by J&L would ascribe to Congress the untenable, illogical intent that all miners except those working in the coal-carrying belt conveyor entries should receive the benefit of having a preshift examination of their work place.

Id. at 17.

Beyond these obvious, forceful and repeated assertions, the Secretary petitioned this Commission to review the ALJ's failure to find a violation for the operator's failure to preshift the area here involved. That petition was granted in its entirety. In his petition, the Secretary left no doubt that he was citing the area, not the coal-carrying belts when he concluded:

> The preshift examiner is not required to test the Conveyor belts itself.
>
> * * * *
>
> In sum, under the standard, an operator must provide a pre-shift examination of those parts of the coal-carrying conveyor belt entries where miners normally work or travel. The examination must cover the items enumerated in the second sentence of the standard.

Petition for discretionary review at 9.

The Secretary supported this argument in his brief (br. at 9-14, 17, 22) and reply brief (r. br. at 3 & n. 1, 14, 16, 17) to the Commission.

Since it is undisputed that there was no preshift examination of these areas involved (Stip. #9, Tr. 7) where the inspector observed miners working along the belts (Tr. 109, 110), only one conclusion can be drawn--that a violation of 75.303 occurred.

The majority has, however, parsed the statutory language beyond the fondest desires of the most scrupulous grammarian. The issue presented is whether the mine operator is required by section 303(d)(1) to preshift active workings of mines along coal conveyor belts. By refusing to consider these cited areas as active workings even though this is not in serious dispute between any of the parties, and although miners were regularly assigned to work, and were observed working along this operator's coal carrying belt lines (Tr. 109, 110), the majority has denied these miners a preshift examination of their work area.

The statute in relevant part provides:

> Within three hours immediately preceding the beginning of <u>any</u> shift, and <u>before</u> any miner in such shift enters the <u>active</u> <u>workings</u> of a coal mine, certified persons designated by the operator of the mine shall examine such <u>workings</u> and any other underground area of the mine

finding. See n. 1, supra. As active workings, the cited areas are therefore required to be preshift examined, unless otherwise excluded or exempted by the statute. The last quoted sentence (supra), argues against any exclusion, and for the requirement of a preshift examination of the area cited by the inspector in this case. The first sentence of section 303(d)(1) describes locales, i.e., "active workings." Section 318(g)(4) of the Act in turn defines "active workings" as "any place in a coal mine where miners are normally required to work or travel."

In 1969 Congress amended the preshift examination provisions of the 1952 Act. This became section 303(d)(1) of the 1969 Coal Act, now sectio 303(d)(1) of the 1977 Mine Act. The Senate Report accompanying the bill in 1969 stated the reason for requiring examinations of all belt conveyor

> Many mine fires occur along belt conveyors as a result of defective electric wiring, overheated bearings, and friction; therefore, an examination of the belt conveyors is necessary.

S. Rep. No. 411, 91st Cong., 1st Sess. 57 (1969), reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Legislative History of the Federal Coal Mine Health and Safety Act of 1969, Part I at 183 (1975).

Only a strained reading of the plain language of the Act could lead to the conclusion that by the 1969 amendments, or their 1977 reenactment, Congress intended to deny miners working along coal carrying belt conveyo the protection of preshift examination of their working places. Congress as reflected in both the legislative history and the statutory language, was increasing, not decreasing examinations, and certainly never contempl miners working in uninspected areas.

The majority's view of 75.303 and its sponsoring statutory provision section 303(d)(1), would not improve or promote safety, but would reduce the protection afforded to miners. This apparently would deny preshift examinations of active workings along coal conveyor belts, and would certainly deny onshift examinations of coal conveyor belts, as in this case for 3-1/2 hours or until the operator performed such during the shift. It would also deny a miner working along a coal conveyor belt on a non coal-producing shift both a preshift and an onshift examination of his working place, and would eliminate all preshift examinations of an active working if the operator placed a coal conveyor belt in such workings. Such a construction is contrary to the intent of Congress as expressed literally in the standard and statute involved here. Instead, the Act should be construed liberally when improved health and safety

> The construction urged by J&L would ascribe to Congress the untenable, illogical intent that all miners except those working in coal-carrying belt conveyor entries should receive the benefit of having a preshift examination of their work place.

Secretary's post hearing brief at 17.

The statute, the legislative history and the majority's analysis fail to demonstrate how a requirement of an examination of "active workings" prior to the start of a shift, and an examination of coal carrying conveyor belts while the mining is underway on the shift, imposes a burden on the operator which outweighs the miner's need to be protected in an area in which he or she is to work. The language of the Act requires no less, and the preventive purpose and thrust of the statute, even if subjected to a balancing analysis, mandates in favor of such a requirement.

The problem with the majority's ignoring the failure to preshift the areas along the belts where miners were working is that, if there were no belts in an active working, the area would be subject to preshift examination. If, however, the operator installed a coal-carrying conveyor belt in such an area, then the requirement of preshift inspection for such active working vanishes. This makes no sense as a matter of either la or logic, and indeed turns enforcement on its head, since the additional potential hazard of adding belts to a mine entry, perversely under the majority's view, eliminates the preshift inspection of the area.

The judge below has drawn no distinction between entries with, or without, coal carrying belts, nor I suggest should we, since such is unnecessary to our decision. A more exact delineation of the inspection of conveyor belts in mine entries may well be more appropriately left to further clarification by the Secretary. Whether or not combined inspectior are appropriate is also better left to the process of regulatory promulga- tion, particularly given the varying circumstances and ramifications of

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3/ The mine here involved is classified as "gassy", and therefore presents even more potential hazards than most. Tr. oral arg. 41-43; and see sectic 103(i) of the 1977 Act. Interestingly, too, J&L--all of whose mines are located in West Virginia and Pennsylvania--has concededly examined all of i mines, preshift, including coal carrying belts, since 1961, although allege only before the first coal producing shift of each work week. Tr. oral arg

are working along such belts, is not presented by this case.

In summary, as the ALJ found and the parties here conceded, these are active workings. They are thus required to be preshift examined pursuant to the first sentence of section 303(d)(1). The prophylactic purpose of the statute requires that such active workings be inspected, and that such inspection not be denied because of either the presence, or the absence, of coal-carrying conveyor belts in those entries.

Based on the clear language of section 303(d)(1) of the Act and its sponsored regulation (30 CFR § 75.303), the legislative history, and in the interest of promoting safety for the miner, 5/ I would find that the statute and the standard involved require a preshift examination of those active workings along a coal conveyor belt, on any shift, before a miner enters his or her work place.

I therefore dissent from the majority's decision, would hold that this operator violated the Act as alleged in the citation and order, and would remand for further proceedings.

A. E. Lawson, Commissioner

4/ Whether or not all or only part of these coal-carrying conveyor belts mus be examined preshift may bear further scrutiny, inasmuch as the Secretary ha the authority to designate more precisely the underground areas of the mine to be examined. Section 303(d)(1). In any event, the promulgation of specific regulations, with all parties having the opportunity to comment thereon, appears obviously preferable to the enunciation of dicta in the instant case.

5/ If section 303(d)(1) is ambiguous, and I do not believe this to be the case, any ambiguity must be interpreted to promote safety and prevent death and injury to miners. Section 2(e) of the Act. District 6, United Mine

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Administrative Law Judge Decisions

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 82-97
Petitioner-Respondent	:	A.O. No. 11-00726-03502
	:	
v.	:	Contest of Citation
	:	
MONTEREY COAL COMPANY,	:	Docket No. LAKE 82-82-R
Contestant-Respondent	:	Citation No. 1004993;4/28/82
	:	
v.	:	No. 1 Mine
	:	
UNITED MINE WORKERS OF AMERICA,	:	
Intervenor	:	

DECISIONS

Appearances: Edward H. Fitch, IV, Attorney, U.S. Department of Labor, Arlington, Virginia, for the Petitioner-Respondent MSHA; Carla K. Ryhal, Esquire, Houston, Texas, for the Contestant-Respondent Monterey Coal Company; Mary Lu Jordan and Joyce A. Hanula, Esquires, Washington, D.C., for the Intervenor UMWA.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern a citation issued by an MSHA inspector pursuant to Section 104(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), charging the respondent-contestant Monterey Coal Company with a violation of Section 103(f) of the Act. The citation no. 1004993, was issued on April 28, 1982, by MSHA Inspector Lonnie D. Conner, and the "condition or practice" is described as follows:

> The operator has refused to pay Miner's Representative Frank H. Barrett, Jr., for the period of time that he accompanied Federal Coal Mine Inspector Joe S. Gibson on a roof control technical investigation of the mine. The investigation was conducted on March 23, 1982.

These cases were docketed for hearing in St. Louis, Missouri, commencin on March 17, 1983. However, the hearing was cancelled after the parties ag to submit the matter to me for summary disposition based on joint stipulati

2. Sections 103 and 110(i) of the Act.

3. Commission Rules, 29 CFR 2700.1 et seq.

4. Section 103(a) of the Act provides:

> Authorized representatives of the Secretary or the Secretary of Health, Education, and Welfare shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, ultilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or other requirements of this Act. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person, except that in carrying out the requirements of clauses (1) and (2) of this subsection, the Secreta of Health, Education, and Welfare may give advance notice of inspections. In carrying out the requiremen of clauses (3) and (4) of this subsection, the Secreta shall make inspections of each underground coal or other mine in its entirety at least four times a year, and of each surface coal or other mine in its entirety at least two times a year. The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this Act, and his experience under this Act and other health and safety laws. For the purpose of making any inspection or investigation under this Act, the Secretary, or the Secretary of Health, Education, and Welfare, with respect to fulfilling his responsibilities under this Act, or any authorizied representative of the Secretary or the Secretary of Health, Education, and Welfare, shall have a right of entry to, upon, or through any coal or other mine. [Emphasis supplied].

a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. To the extent that the Secretary or authorized representative of the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives. However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act. [Emphasis Supplied].

Issues

The parties stipulated that the following issues are presented for decision by me in these proceedings:

1. Is an operator required by Section 103(f) of the Act to compensate a miner's representative for the time spent accompanying a federal inspector on a spot inspection?

> The parties agree that relevant decisions regarding this issue have been rendered by the United States Court of Appeals for the District of Columbia in United Mine Workers of America v. Federal Mine

of Labor, Docket No. PIKE 78-599 (Nov. 30, 1979), and No. 80-1021; Secretary of Labor v. Allied Chemical Corp., Docket No. WEVA 79-148-D (Dec. 6, 1979).

2. Is a roof control technical investigation different from a spot inspection for purposes of determining an operator's obligation to compensate a miner's representative for the time spent accompanying a federal inspector pursuant to Section 103(f) of the Federal Mine Safety and Health Act of 1977?

Any additional issues raised by the pleadings and briefs are identified and disposed of in the course of these decisions.

The parties stipulated and agreed to the following:

1. Monterey Coal Company owns and operates the No. 1 Mine (Identificat No. 11-00726), which is located in Carlinville, Macoupin County, Illinois, and the mine is subject to the Act.

2. Respondent is subject to the jurisdiction of the Act, the presiding Judge has jurisdiction to hear and decide these cases, and the citation in issue was properly served on the respondent.

3. On March 23, 1982, Federal Coal Mine Inspector Joe S. Gibson, a duly authorized representative of the Secretary and a roof control specialist, conducted what is referred to by MSHA as a "CEA-Roof Control Technical Investigation" (Investigation) of the Monterey No. 1 Mine.

4. A "CEA-Roof Control Technical Investigation" is different from a "regular" inspection. Each activity code, including a "CEA-Roof Control Technical Investigation," is defined as indicated in an attached Exhibit "A" dated June 3, 1979. These activity codes and definitions are included in the MSHA Citation and Order Manual. The activity codes are used by the Department of Labor's Mine Safety and Health Administration both to substantively describe the various enforcement procedures conducted by MSHA and to record the utilization of inspector work hours by means of an automated computerized coding system. The activity codes cover a broad range of activities which are variously applicable to individual inspectors, but collectively are applicable to the entire agency's function.

5. The Secretary and the UMWA consider a CEA-Roof Control Technical Investigation enforcement procedure to be a type of spot inspection covered by Section 103(f) walk-around pay provisions. Monterey does not agree with this determination and maintains that this type of investigation is not a type of spot inspection, nor any type of inspection, and that it is

the roof and ribs, and to determine if the operator is in compliance with all the provisions of the mine's roof control plan. In fact, during the investigation in question, a citation of alleging a violation of the Monterey No. 1 Mine's roof control plan was issued, as well as a terminat thereof. This enforcement procedure is a regular function of MSHA roof control specialists.

7. During said investigation, Frank H. Barrett, Jr., a representati of the United Mine Workers of America, accompanied Mr. Gibson, but Mr. Barrett was not paid by Monterey for the period of his participation in said investigation.

8. On April 28, 1982, Federal Coal Mine Inspector Lonnie D. Conner, a duly authorized representative of the Secretary, issued Citation No. 1((Citation) and served the same upon Dick Mottershaw, Safety Coordinator f Monterey. The Citation stated that it was issued pursuant to Section 104 of the Act and alleged a violation of Section 103(f) of the Act. Under t heading "Condition or Practice" the Citation alleges that:

> The operator has refused to pay miner's representative Frank H. Barrett, Jr. for the period of time that he accompanied Federal Coal Mine Inspector Joe S. Gibson on a Roof Control Technical Investigation of the mine. The investigation was conducted on March 23, 1982.

9. On April 30, 1982, Monterey paid Mr. Barrett for the period of l participation in said investigation. Thereafter, on May 3, 1982, Mr. Co issued Termination No. 1004993-1, which under the heading "Justification for Action Checked Below" stated that:

> The operator has paid Miner's Representative Frank H. Barrett, Jr. for the period of time that he accompanied Federal Coal Mine Inspector Joe S. Gibson on a (sic) investigation of the mine.

10. Monterey is a large operator and the assessment of a civil pen in this matter, if appropriate, would not adversely affect Monterey's ability to remain in business.

11. The Monterey No. 1 Mine's history of previous violations is indicated in a computer printout of violations issued in the two years preceding April 28, 1982 (see exhibit "G").

for the time spent accompanying the Secretary's authorized representative during the inspection of a mine ("walkaround pay"). The material facts are not in dispute and have been stipulated to by the parties. Thus, the matter for determination is one involving a question of law, and the parties seek summary decisions pursuant to Commission Rule 29 CFR 2700.64(b

MSHA and the UMWA contend that Monterey's declination to compensate the miners' representative for the period of his participation of the roof control technical investigation on the occasion in question constitutes a violation of Section 103(f) pursuant to the holding in United Mine Worker of America v. Federal Mine Safety and Health Review Commission, 671 F.2d 615 (D.C. Cir. 1982), cert. denied, 74 L.Ed. 2d 189 (Oct. 12, 1982) ("UMWA v. FMSHRC"). Monterey submits, however, that the right to walkaround pay is limited to mandatory inspections of a mine as required by Section 103(a) of the Act, and does not extend to other inspections or investigations required, authorized or permitted by the Act. Monterey asserts that a roof control technical investigation is not such a mandatory inspection required by Section 103(a). Thus, it is Monterey's position that its declination to pay the miners' representative for the period of his participation in the Roof Control Technical Investigation on the occasion in question was not a violation of the Act and, consequently, the citation and proposal for a penalty are invalid and should be vacated and dismissed.

Monterey's Arguments

Monterey concedes that there is a right to walkaround pay under Section 103(f) of the Act in connection with "regular inspections" conducte under Section 103(a). Monterey suggests that the term "regular inspections has been interpreted by MSHA and the mining industry to connote the mandatory inspections mandated by Section 103(a), and that the term "spot inspection" has come to have the accepted meaning of any inspection other than the mandatory inspections of the entire mine.

Monterey argues that when read together, Sections 103(f) and 103(a) limit the right of the miners' representative to compensation for walkaroun activities to only the miners' representative's participation in the "regular inspections" mandated by Section 103(a) of the Act. Further, Monterey argues that if Congress had intended the walkaround pay right to apply to all inspections, then it could easily have used the phrase "any inspection" in Section 103(f) instead of referring to an inspection "made pursuant to the provisions of subsection (a)," the language actually chosen. Monterey points out that Section 103(h) of the 1969 Act did refer to "any inspection," and in other sections of the Act where Congress intended a provision to apply to all inspections, Congress specifically used the term "any inspection."

representatives have the right to be compensated for the time spent accompanying MSHA inspectors during spot and regular inspections, Monterey takes the position that the Court's decision was erroneous, and that it is not binding on the Commission or its Judges. Citing a number of Commission decisions which uniformly held that Section 103(f) grants walkaround pay rights to miners' representatives only with respect to regular inspections required by Section 103(a), and not with respect to spot inspections, and citing the legislative history remarks of Representati Carl D. Perkins in support of its argument, Monterey strongly suggests that the Court's decision in UMWA v. FMSHRC should be ignored.

With regard to MSHA's Interpretive Bulletin, 43 Fed. Reg. 17546, April 25, 1980, which lists spot inspections, as well as regular inspections among the types of activities giving rise to walkaround rights, Monterey argues that I am not bound by the information contained therein.

In further support of its position, Monterey states that even if its obligation to compensate the miners' representative for the time spent accompanying an inspector extends to spot inspections, it does not extend to a roof control technical investigation. In support of this argument, Monterey maintains that investigations and inspections are distinguishable, and the fact that Congress included both inspections and investigations within the coverage of Section 103(a), but used only the term inspection in Section 103(f), clearly indicates that it did not intend investigations to be included within the walkaround provisions of Section 103(f).

Monterey points to the fact that throughout the Act some provisions use only the terms "inspection", and some use only the term "investigation" and some use both terms. However, Monterey suggests that the two terms are never used interchangeably in the Act, and that they are used to mean different things. Since, in all cases, the usage of the terms is logical and consistent with the different meanings of the terms, Monterey concludes that it is inescapable that throughout the Act, and specifically in Section 103(f), Congress made a purposeful and intelligent distinction between the two terms. As an example, Monterey cites the Act's provision in Section 110(e) restricting a person from giving advance notice of an inspection, while there is no restriction in connection with investigations

Monterey cites the Activity Codes included in MSHA's Citation and Orde Manual, as a further indication that the Secretary also recognizes the distinction between an inspection and an investigation (Exhibit "A", Stipulations). Under Categories A ("Mandatory Inspections and Investigatio

and investigations are different activities, otherwise MSHA would not have coded and defined an inspection and an investigation to address the same concern.

In response to MSHA's assertion that a roof control technical investigation is an enforcement procedure and, as such, is similar to an inspection since the inspector may cite violations of any standards observed during such an investigation, thereby making it subject to the walkaround provisions of the Act, Monterey maintains that while the purposes for conducting inspections and investigations may be the same under Section of the Act, there is no indication that the two terms were intended to mean the same thing. The fact that while conducting a roof control technical investigation an inspector may issue citations for violations of standards other than the roof support standards does not render inspecti and investigations synonymous, and Section 104(a) requires an inspector conducting either an inspection or investigation to issue a citation whenev he observes a violation of the "Act, or any mandatory health or safety standard . . . "

In further support of its position in these proceedings, Monterey maintains that sound policy reasons exist for distinguishing between technical investigations, if not spot inspections, and regular inspections, consistent with the remedial functions of the Act. The first sentence of Section 103(f) expressly states that the purpose of the right to accompany inspectors, and the right to be paid therefor, is to aid in the inspection. Regular inspections and technical investigations are entirely different in scope and purpose. Because regular inspections are detailed and extensi covering every aspect of health and safety in the mine, it is conceivable t the miners' representative accompanying an inspector on a regular inspectio could improve the inspector's effectiveness by contributing personal familiarity with the particular mine and by providing another "pair of eyes and could enhance miner consciousness as to the complex regulatory scheme created by the Act.

In contrast, argues Monterey, a technical inspection, by its very nature, focuses on one hazard and usually involves narrow, technical procedures. Inspectors who conduct technical investigations are normally specialists who specialize in one type of safety or health standard, such as respirable dust, ventilation control, or electrical standards. They are especially qualified by training, experience and familiarity with a particular problem. The presence of the miners' representative is not like

technical procedures. Nor would the observation by the miners' representative of the inspector conducting these narrow technical procedures enhance the consciousness of miners who perform or observe similar procedures on a regular basis. Monterey points out that a Roof Control Technical Investigation, such as that conducted on the occasion in question, is conducted to determine an operator's compliance with the standards relating to roof support and includes observation of roof bolting activities, measurement of room, entry, crosscut widths, and roof bolt spacing; and sounding of the roof and ribs, and the inspecto who conducted the Roof Control Technical Investigation in question was, indeed, a roof control specialist.

Monterey concludes that because the primary purposes for the miners' representatives to accompany an inspector are not applicable in the situation of a technical investigation, its obligation to compensate the representative for doing so should not extend to technical inspections in general, nor to roof control technical investigations in particular.

MSHA's Arguments

In support of its case, MSHA relies on the February 23, 1982, decisio by the U.S. Court of Appeals for the District of Columbia Circuit in UMWA Federal Mine Safety and Health Review Commission, 671 F.2d 615 (D.C. Cir. 1982), cert denied, 74 L. Ed. 2d 189 (Oct. 12, 1982), holding that the rig to walkaround pay is coextensive with the right to accompany an inspector under Section 103(f) of the Act, and that spot inspections, as well as regular inspections, were included in the coverage of Section 103(f) for walkaround pay purposes.

MSHA asserts that the Court of Appeals interpretation of Section 103(should be followed and applied until such time as that interpretation is reversed or modified by the D.C. Circuit, another Federal Court of appeals or the Supreme Court. MSHA argues that the D.C. Circuit properly interpre the scope and application of Section 103(f) to require an operator to compensate a miner's representative for the time spent accompanying an inspector on a spot inspection, and that Monterey's suggestion that I should ignore the Court's interpretation should be rejected.

MSHA maintains that the inspection at issue in this proceeding is a type of spot inspection activity which has been described as a roof contro technical investigation. It is MSHA's view that the use of the word "investigation" does not negate the reality that the activity involved an inspection of the mine related to its roof control plan, that the enforcer procedure was an inspection activity related to the specifics of the mine' roof control plan and was conducted by an authorized representative of the

substance of an inspector's activity must serve as the foundation to determine the applicability of Section 103(f), not the code chosen to track the inspector's use of his time.

MSHA concludes that if the Commission and its Judges were to ignore the Court of Appeals precedent, the Secretary would be placed in the burdensome and costly position of repeatedly issuing citations, defending them before the Commission, and then seeking review before the D.C. Circuit. Such a result, suggests MSHA, would be contrary to public policy and practical reality and would make a travesty of the Court's ruling. MSHA concludes further that I should give full force and effect to the Court of Appeals decision and implement the Court's statutory construction of Section 103(f) by affirming the citation, determining an appropriate penalty and dismissing the notice of contest filed in this matter.

The UMWA's arguments

The UMWA's position in this case is similar to that taken by MSHA. Citing UMWA v. FMSHRC, supra, the UMWA emphasizes the fact that the D.C. Circuit rejected the position taken by Monterey in the instant proceeding and upheld the Secretary's Interpretive Bulletin, requiring walkaround pay for spot inspections. In so doing, the Court reversed the Commission's decision in Secretary of Labor v. Helen Mining Company, 1 FMSHRC 1796 (1979), and the UMWA urges that I reject the notion advanced by Monterey that I should ignore the D.C. Circuit and apply the Helen Mining decision.

In support of its position, the UMWA points out that the Commission remanded the UMWA v. FMSHRC line of cases to the appropriate Judges, with directions for adjudicating the cases consistent with the D.C. Circuit's decision. Further, the UMWA emphasizes that the conditions generally advanced to support the cited NLRB's policy of nonacquiescense with Court precedents are not present in the instant proceedings. The UMWA maintains that the Commission's decision in Secretary of Labor v. Magma Copper Co., 1 FMSHRC 1948, aff'd, 645 F.2d 694 (9th Cir. 1981), cert. denied, 454 U.S. 940 (1981), illustrates the Commission's view that the active participation of miners in the enforcement of the Act will lead to improved health and safety in the mines.

The UMWA maintains that the Commission's decision in Helen Mining restricted walkaround pay, not because the majority felt, on the basis of its expertise, that the purposes of the Act would best be served by compensating miners only during the quarterly inspections of the entire mine. The majority reached that result only because of their determination concerning how much weight should be given to Congressman Perkins' remarks in determining Congressional intent. The D.C. Circuit has determined

chose, his activities on March 23, 1982, were clearly enforcement related and were the type of actions contemplated in the Secretary's Interpretive Bulletin as giving rise to Section 103(f) rights. Further, the UMWA maintains that it was entirely appropriate for MSHA to determine that, for purposes of Section 103(f) the enforcement activity conducted at the mine on March 23 was a type of spot inspection, even though, for purposes of MSHA's computer activity code, the action was listed under "CEA", which is designated a "Safety and Health Roof Control Technical Investigation". Regardless of what "activity code" the inspector's actions came under, the UMWA maintains that they clearly fell within the type of activity described in the Interpretive Bulletin as givin rise to Section 103(f) participation rights.

The UMWA concludes that given the fact that Congress considered an important purpose of the walkaround right to be the improvement of the miners' knowledge of health and safety standards, and given the fact that Congress saw a particular need for the improvement of such knowledge in the area of roof control, it would be completely contrary to Congressi intent to interpret Section 103(f) in a manner that precluded miner participation in MSHA's roof control investigations. The UMWA points out that unlike most other mandatory safety standards, the roof control requirements are contained in individual plans, tailored to the specific conditions of each mine, and they are subject to review by MSHA District Managers every 6 months. The District Managers are required to consider any instances of inadequate support and may require improvements in the plan if they deem it necessary (30 C.F.R. § 75.200). Allowing miners to actively participate in "roof control technical investigations," such as the one that occurred at the No. 1 Mine, will assist MSHA in carrying out its obligations to review the plans. If miners are traveling with MSHA inspectors when they monitor compliance with the plan, the inspectors wil be more likely to be made aware of any occasion when the plan has proved inadequate and will be able to obtain suggestions from the miners as to necessary improvements. The fact that roof control plans are subject to continual revision makes it all the more necessary that miners partici in "roof control technical investigations," so they can be kept abreast o the changes and improvements.

Findings and Conclusions

Section 103(a) of the Act directs the Secretary to make "frequent inspections and investigations" for the purpose of--

(2) gathering information with respect to mandatory health or safety standards,

(3) determining whether an imminent danger exists, and

(4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act.

Section 103(f) mandates that a miners' representative be given an opportunity to accompany an inspector during his physical inspection of the mine for the purpose of aiding him in his inspection, and it seems clear to me that the representative is entitled to be compensated during the time spent on the inspection. In the instant case, the question pres is whether or not such compensation is limited to the four annual regular inspections authorized by Section 103(a), and whether or not the roof con technical investigation conducted by Inspector Gibson on March 23, 1982, in fact a "spot inspection". If one can conclude that the investigation in question was a spot inspection, the question next presented is whether the miners' representative was entitled to be compensated.

The Commission has previously considered the walkaround provisions found in Section 103(f) of the Act in five consolidated cases which resul from certain MSHA spot inspections for excessive levels of methane gas and electrical hazards; Helen Mining Company, FMSHRC 2193 (1979); Kentland-Elkhorn Coal Corporation, 1 FMSHRC 2230 (1979), and Allied Chemi Corporation, 1 FMSHRC 2232 (1979). In each of those cases, the Commissio held that while miners had a right to participate in all mine inspections mine operators were required to pay them only for their participation in the regular mandatory inspections mandated by Section 103(a) of the Act, and not for "spot" inspections authorized by other sections of the law. On appeal to the United States Court of Appeals for the District of Colum Circuit, the Court, in a split decision issued on February 23, 1982, reversed the Commission and held that miners were entitled to walkaround pay for "spot" inspections, as well as for regularly scheduled inspectior UMWA v. Federal Mine Safety and Health Review Commission, 671 F.2d 615 (D.C. Cir. 1982), cert. denied, 74 L. Ed. 2d 189, October 12, 1982.

In its supporting brief, Monterey argues that the Court of Appeals decision in UMWA f. FMSHRC, supra, was erroneous and that it is not binding on the Commission or its Judges. In a recent decision issued by

consistent with the court's Order", 4 FMSHRC 850 (1982). The remand order to Judge Kennedy specifically makes reference to UMWA v. FMSHRC and similar orders were issued in a number of cases decided before UMWA v. FMSHRC (See Orders reported at 4 FMSHRC pgs. 854 through 881). In each instance, the Commission's remand orders directed the Judges to adjudicate them in a manner consistent with the decision in UMWA v. FMSHRC. Thus, I am in agreement with the UMWA's arguments in this case that the Commission has not been inclined to deviate from the D.C. Circuit Court of Appeal's ruling in UMWA v. FMSHRC, supra.

Upon review of Judge Kennedy's decision on remand in Southern Ohio Coal Company, I agree with his holding that he is bound by the Court's decision in UMWA v. FMSHRC, that he should not consider de novo the question of law decided in that case, and I incorporate herein by reference his rationale in support of that holding as grounds for my rejection of the respondent's identical argument in this case. I conclude that I am bound by the Court's decision, and that spot inspections are compensable under Section 103(f).

Exhibit "A" to the stipulations is a June 30, 1979, itemized computer "Activity Codes" listing defining each of the various types of inspect and investigations conducted by MSHA. Category "A" is styled Mandatory Inspection and Investigations, and included among the twenty (20) kinds of inspections in this category are the AAA and AAB regular and saturation inspections of the entire mine, eight different types of "spot inspections a "reopening inspection" covering mines formerly abandoned or inactive, a "toxic substance or harmful physical agent inspection", two "technical inspections" dealing with section 101 petitions, four different kinds of "accident investigations", one "special investigation" dealing with willfu violations, and one investigation dealing with discrimination complaints.

Category "B" is styled Policy Inspections and Investigations, and included in this category are eleven (11) different kinds of "technical and special investigations and inspections."

Category "C" is styled Auxiliary Inspections and Investigations, and included in this category are nineteen (19) different kinds of "technical and special investigations and inspections."

Since the avowed purpose of the codes is to track the inspector's time for fiscal and budget purposes, logic dictates that each code is for a particular and specific type of activity, whether it be styled "investigation" or "inspection". Although it is true that the computerize coding system facilitates the tracking of inspector work hours, those inspector activities connected with MSHA's actual on-site enforcement

Both MSHA and the UMWA argue that a liberal construction of the provisions of the Act require that miners' representatives be compensated by the mine operator for the time spent on the roof control investigation in question. If one were to accept the arguments advanced by MSHA and the UMWA, then it would logically follow that a miners' representative would be entitled to compensation each time he leaves his regular job in the mine to accompany an MSHA inspector on any of the fifty (50) inspections-investigations covered by MSHA's regulations. While it is not clear that Congress ever intended such a result, MSHA's Interpretive Bulletin distinguishes between pure enforcement inspection activities and those of a purely technical nature unrelated to enforcement. See Interpretive Bulletin, 43 Fed. Reg. 17547, which states as follows:

> Section 103(f) does not necessarily apply to every situation in which a representative of the Secretary is at a mine. Rather, section 103(f) contemplates activities where the inspector is present for purposes of physically observing or monitoring safety and health conditions as part of a direct enforcement activity. This is indicated by the text of section 103(f) itself, which refers to "physical inspection" where the presence of miners' representatives will "aid" the inspection.

The Bulletin goes on to explain the types of activities which do not give rise to miners' representative participation and compensation, and included in the explanation of the matters excluded from such participati and compensation is the following, at pg. 17548:

> In these types of activities, while there may sometimes be a need to physically observe or monitor certain conditions or practices, this aspect of the overall primary activity is incidental to other purposes. Although enforcement action could result from certain of these activities, the relationship of the activities to enforcement of safety and health requirements is indirect, or the activity is being carried out in accordance other duties under the Act. The continuing presence of a representative of miners in all phases of these activities would not necessarily aid the activity.

The parties have stipulated that the type of inspection conducted by Inspector Gibson on March 23, 1982 is known as a "CEA-Roof Control Technical Investigation", which is defined by MSHA as follows in Exhibit pg. A3-6:

CFR 75.200 through 75.205, as well as all standards in general. Although the parties agreed that Inspector Gibson's primary responsibility was to observe the roof bolting activities, to measure room, entry, crosscut widths, roof bolt spacing, and to sould the roof and ribs, all for the purpose of determining respondent's compliance with the applicable mine roof control plan, they further agreed that during this enforcement procedure Inspector Gibson may and does cite any observable violations of any mandatory standards. As a matter of fact, during the investigation in question, Inspector Gibson issued a citation for a violation of the roof control plan, and a copy is attached as Exhibit "B" to the stipulatio The citation was issued pursuant to section 104(a) of the Act, and it charges a violation of mandatory standard section 75.200, because one of the mined intersections of a track entry had a diagonal measurement of 43 feet, which was in excess of the 38-foot requirement stated in the roof control plan. Inspector Gibson terminated the citation within an hour of its issuance after abatement was achieved by the installation of additional roof posts to narrow the cited diagonal to the required width.

The crux of Monterey's arguments that the roof control technical investigation conducted by Inspector Gibson in this case was not compensab under Section 103(f), is the assertion that the terms "inspections" and "investigations" have different meanings and are never used interchangeabl in the Act. Monterey maintains that the fact that Congress included both terms within the coverage of Section 103(a), but used only the term "inspection" in Section 103(f), indicates that Congress clearly intended that compensation only be paid for inspections and not for investigations.

In my view, the fact that a technical investigation may focus on one hazard, and may only involve an inspector's review of narrow and technical procedures, is really not that important in distinguishing this activity from an inspection. A spot inspection often focuses on one hazard, and often involves narrow technical matters dealing with ventilati electrical matters, etc., and I fail to see the distinction in the two procedures. I have difficulty understanding any real distinction between a spot inspection and an investigation or inspection to determine whether a mine operator is in compliance with his required roof control plan. Simply because MSHA chooses to place different computer code lables on the two activities does not ipso facto change or alter the inspector's authority or the manner in which he goes about his inspection in any given case. I believe that an examination of the prevailing facts, on a case-by- basis, should permit one to distinguish precisely what the inspector is

correct, and I reject the arguments advanced by Monterey. I conclude and find that Inspector Gibson's enforcement activities at the mine on March 23, 1982, constituted a spot inspection, and that the walkaround representative was entitled to be compensated for the time spent accompan the inspector. Under the circumstances, Monterey's initial refusal to pay the representative constitutes a violation of section 103(f) of the Act, and Citation No. 1004993, issued on April 28, 1982, IS AFFIRMED.

Negligence

The parties have advanced no arguments concerning negligence. However, it seems obvious to me that Monterey's refusal to pay the walk-around representative was based on a legal interpretation of the scope ar application of section 103(f), and its obvious intent was to test the law. Taken in this context, I do not believe that the facts here present lend themselves to an appropriate negligence finding.

Size of Business and Effect of Civil Penalty on Monterey's Ability to Remain in Business.

The parties have stipulated that Monterey is a large mine operator and that the proposed civil penalty will not adversely affect its ability to remain in business. I adopt these stipulations as my findings and conclusions.

History of Prior Violations

The parties have stipulated to the history of prior violations for the two years preceding the issuance of the citation in question in this case (computer print-out, Exhibit G). I take note of the fact that Monterey has paid civil penalty assessments for all but two of 362 citati issued during this time period, and for an operation of its size, and on the facts of this case, I cannot conclude that the record warrants an increase in the penalty assessed in this case.

Gravity

The parties have advanced no arguments concerning the gravity of the violation, and I conclude that it was nonserious.

The parties have stipulated that Monterey paid walkaround representative ank H. Barrett, Jr., on April 30, 1982, and payment was made within e time fixed for abatement. Accordingly, I conclude that Monterey monstrated good faith compliance once the citation issued.

Penalty Assessment and Order

MSHA's initial proposed civil penalty assessment of $20 for the violaon in question seems reasonable in the circumstances and I accept it. nterey IS ORDERED to pay the $20 civil penalty assessment within thirty 0) days of the date of this decision.

In view of the disposition of the civil penalty proceeding, Monterey's ntest (LAKE 82-82-R) IS DENIED and DISMISSED.

George A. Koutras
Administrative Law Judge

stribution:

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v.	:	Mine: Sandow Strip
	:	
INDUSTRIAL GENERATING COMPANY,	:	
Respondent	:	

DECISION

Appearances: Donald W. Hill, Esq., Office of the Solicitor
U.S. Department of Labor, Dallas, Texas,
for Petitioner;
Mike Holloway, Esq., Dallas, Texas,
for Respondent.

Before: Judge Morris

The petitioner, the Secretary of Labor, charges respondent wit violating Title 30, Code of Federal Regulations § 77.701, a safety promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. seq. The cited regulation provides as follows:

> Metallic frames, casings, and other enclosures of electric equipment that can become "alive" through failure of insul or by contact with energized parts shall be grounded by met approved by an authorized representative of the Secretary.

After notice to the parties a hearing was held in Dallas, Texa October 26, 1982.

Procedural History

This matter was originally scheduled for hearing on August 21 before Judge Jon D. Boltz. A continuance was granted and the case set for December 4, 1981. That hearing date was vacated and this transferred to the writer on February 5, 1982.

he judge.

The parties waived post hearing briefs.

Issues

The issues are whether respondent violated the above regulation and, if o, what penalties are appropriate?

Stipulated Facts

Inside its maintenance building, or shop, respondent maintains three verhead cranes. The cranes have a capacity of 5, 10, and 20 tons (Tr. 10, 4, 16; Exhibit R1-R4). They rest and move on railroad rails 30 feet above he concrete floor. The cranes, with attached cables, move heavy equipment uch as bulldozers and scrapers (Tr. 10, 15).

The area in front of the maintenance building is paved and the area to he side of the building is paved with rock (Tr. 18). Lignite, moved by a losed conveyor system, passes in front of the shop (Tr. 17).

There is no significant accumulation of dust particles in the building. ny accumulation would be routine dust such as the dust particles in the air n any room (Tr. 10, 17).

The cranes sit on rails which are attached to the sides of the building hich are grounded (Tr. 6).

The strip mining itself does not cause any significant amount of dust o ther substance to accumulate in the air at the maintenance shop (Tr. 10). he crusher is two miles away and the strip mining is three miles away (Tr. 0, 17). No spray painting or anything of that nature is carried on in the hop (Tr. 16).

The MSHA inspector did not go up and look at the wheels and the rails Tr. 19).

The citation was issued because of some past experience with crane ystems supposedly similar to this system (Tr. 20).

The Secretary acknowledges that respondent's expert witnesses, present or the hearing, are very knowledgeable (Tr. 19).

have steel wheels and steel rails that are as shiny as a mirror (Tr. 21, 22). The shiny portion is polished raw steel. In 34 years expert Pittman had never experienced a failure of a ground because of a dust condition between the wheels and the rails. Respondent's expert in his research contacted man operators. They all indicated there was no need for an additional ground (Tr. 23).

The National Electrical Code, 1978 Edition, Section 610-61 entitled "Grounding" provides as follows:

> All exposed metal parts of cranes, monorail hoists, hoists and accessories, including pendant controls, shall be metallically joined together into a continuous electrical conductor so that the entire crane or hoist will be grounded in accordance with Article 250. Moving parts, other than removable accessories or attachments having metal-to-metal bearing surfaces, shall be considered to be electrically connected to each other through the bearing surfaces for grounding purposes. The trolley frame and bridge frame shall be considered as electrically grounded through the bridge and trolley wheels and its respective tracks unless local conditions, such as paint or other insulating material prevent reliable metal-to-metal contact. In this case a separate bonding conductor shall be provided. (Transcript at 28).

Discussion

Respondent asserts it did not violate 30 C.F.R. § 77.701 since there is no possibility that the equipment could become "alive" because of a failure of insulation or through contact with energized parts.

I agree with this view since the metal wheels of the cranes roll on metal rails; accordingly, the equipment is grounded by virtue of the continuous metal to metal contact between the two surfaces.

This method of metal to metal grounding is recognized under the Nationa Electrical Code (NEC) § 610-61. In its pertinent part it provides as follows:

> All exposed metal parts of cranes ... shall be metallically joined together into a continuous electrical conductor so that the entire crane ... will be grounded in accordance with Article 250 ... . The trolley frame and bridge frame shall be considered as electrically grounded through the bridge and trolley wheels .... (emphasis added).

I find the Secretary's argument unpersuasive for several reasons. The cranes are all housed inside a building. They are 30 feet above a concrete floor and they are located approximately three miles from the minin area. The amount of dust particles accumulating in the building is minimal and insignificant. The citation issued at the inspection is void of any notation concerning any dust accumulation. Further, the inspector did not examine the wheels and rails for any such accumulation.

In addition, respondent's expert, (whom the Secretary recognizes as ver knowledgeable), indicated that the ground of the metal to metal contact woul not be lost due to the amount of dust that could accumulate here (Tr. 14, 1 21). Further, in his 34 years in the field, respondent's expert had never seen a ground loss occur under the conditions urged by the inspector. Respondent's expert, in researching other operators, universally found no need for an additional ground.

Due to the considerable expertise of respondent's experts I find such evidence to be very credible.

The Secretary appears to advance an argument that the grounding method used by respondent is inadequate because accidents, or loss of grounding, ha occurred where such cranes were not equipped with a supplemental grounding mechanism. No documentation or evidence was produced showing loss of groun in these or similar circumstances. On the other hand respondent's expert testimony, reviewed above, was directly to the contrary indicating no histo of such accidents. I therefore conclude that there is no history of accidents in similar circumstances to suggest that the electrical equipment cited here could become alive.

Section 610-61 of the NEC does indicate that a separate ground would be necessary if, "[l]ocal conditions, such as paint or other insulating materi prevent reliable metal-to-metal contact." However, the parties have stipu- lated that no significant accumulation of dust occurs in the area of the cranes. The record shows that there is no painting in the building which houses the cranes and that the building is used exclusively for maintenance purposes. No mining activity takes place (Tr. 16). There was also testimo by respondent's expert that there were no insulating materials on the wheel or rails (Tr. 23).

I conclude that there is no realistic possibility that the cranes operated by respondent could become alive by reason of failure of insulatio or contact with energized parts. No violation of 30 C.F.R. § 77.701 occurred.

Citations No. 792310 and 792311 and all proposed penalties there
vacated.

John J. Morris
Administrative Law Judge

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Complainant	:	
	:	Docket No. KENT 82-41-D
v.	:	
	:	
SUNFIRE COAL COMPANY,	:	
Respondent	:	

ORDER AWARDING BACKPAY AND LEGAL FEES

In response to my Order of April 5, 1983, the parties filed their claims and supporting arguments with respect to the compensation due the complainant in this case. Respondent's "calculations of lost wages", filed with me on April 27, 1983, covers the period from August 6, 1981, the date of the complainant's discharge, through and including September the date on which the respondent claims it ceased operations and terminat its work force, and the date that the complainant would have been finally terminated had he continued in respondent's employment. Respondent's calculations for the total gross wages, without deductions for withholdin state and local taxes, which the complainant would have earned had he continued in respondent's employment is $18,634.60, and those calculation were arrived at by an affidavit executed by respondent's personnel direct Included in those calculations is the sum of $17,879.40 in gross wages, plus accrued vacation time in the amount of $755.20, for a total of $18,6 The wage calculations include a weekly summary for each company payroll period in 1981 and 1982, the hours worked, the hourly wage, and periods of lay-offs. The calculations for 1981 are based on the payroll periods ending August 15, 1981 through December 25, 1981, and for the year 1982, they are computed for the payroll period ending January 4, 1982, through September 10, 1982, when the respondent asserts the mine was closed and all employees were terminated.

In addition to its calculation of the complainant's gross wages, respondent asserts that the complainant earned gross wages in the amount of $255.20 as an employee of Linefork Coal Corporation, and the sum of $3,005 as an employee of P.M. Coal Company, and in support of this assertion included copies of the complainant's withholding statements for these employments subsequent to his discharge.

Respondent asserted that subsequent to his discharge, the complainan had received unemployment insurance benefits in the amount of $3,444; $56 from an extended benefits claim; and $2,240 for federal supplemental compensation, the sum of which totals $6,244. Respondent maintained that it is entitled to deduct this amount from complainant's gross wages, and based on its submitted calculations, stated that the total gross wages

$15,374.40
- 6,244.00. . . . . Less unemployment benefits and compensatio
$ 9,130.40. . . . . Total respondent claims is due.

With regard to any award of costs and attorneys fees, respond argued that the complainant in this case was represented by the Ap Research & Defense Fund of Kentucky, Inc., an organization which r believes is federally funded. Although recognizing the fact that attorney would ordinarily be entitled to be compensated for servic performed in representing the complainant in this matter, respond apparently takes the position that since the legal services organi which pursued his claim is federally funded, by its mandate, it sh have accepted this case. By doing so, respondent infers that the which represented the complainant provided free legal service, and complainant incurred no legal expenses in pursuing his claim. Acc respondent concluded that no amount should be awarded as attorney' for complainant's legal representation in this case.

In its response to my Order of April 5, 1983, complainant's c took issue with the following items submitted by the respondent in calculation of lost wages, and requested an opportunity for additi discovery:

--lack of documentation for the assertion that complainant would have worked less than 40 hours during several weeks of the back-pay period.

--lack of documentation to support the assertion that th complainant would have been laid off during a three month period from October-December 1982.

--failure by the respondent to address the question of reinstatement, particularly in view of information received by the complainant that any sale of Sunfire Coal Company includes a clause providing for reinstate-ment by the purchaser of laid-off miners.

Complainant's calculations of the backpay and costs due are s in a copy of a letter dated March 24, 1983, to respondent's counse are as follows:

Wages through September 10, 1982	$25,804
Minus wages earned	- 3,260
Back owed	$22,544
Interest	x .12

hours devoted to each task. In summary, these fees and costs, for legal services through October 21, 1982, are as follows:

Tony Oppegard: 284.3 hours at $70/hr.	$19,901
Stephen A. Sanders: 34.5 hours at $50/hr.	1,625
attorneys' fees	$21,526
mileage	+ 289
phone	+ 53
other expenses (depositions, transcript, witness fees, etc.)	+ 304
TOTAL	$22,172

In response to the respondent's assertion that unemployment compensation benefits should be deducted from any back-pay due the complainant, complainant's counsel asserted that such benefits should not be considered interim earnings, and thus should not be deducted from any backpay award, and in support of this argument he cites 3 NLRB Casehandling Manual § 10604 Bradley v. Belva Coal Co., 3 FMSHRC 921 (1981); Neal v. Boich, 3 FMSHRC 443 (1981); Wilson & Rummel v. Laurel Shaft Const. Co., 2 FMSHRC 2623 (1980); NLRB v. Pan Scape Corp., 607 F.2d 198 (7th Cir. 1979); Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730 (5th Cir. 1977).

In response to the respondent's argument that the complainant has incurred no legal expenses in pursuing his claim because of legal represent tion furnished him by the Appalachian Research & Defense Fund of Kentucky, Inc., a legal services organization, complainant's counsel states that this argument is wholly without merit and that similar challenges have been rejected not only by a Commission Judge, Bradley v. Belva Coal, 3 FMSH 921, 924 (1981), but by the eight U.S. Circuit Courts of Appeals that have considered the issue. Bonnes v. Long, 599 F.2d 1316 (4th Cir. 1979); Weisenberger v. Huecker, 593 F.2d 49 (6th Cir. 1979); Mid-Hudson Legal Serv v. G & U, Inc., 578 F.2d 34 (2nd Cir. 1978); Perez v. Rodriguez Bou, 575 F.2d 21 (1st Cir. 1978); Rodriguez v. Taylor, 569 F.2d 1231 (3rd Cir. 1977) Bond v. Stanton, 555 F.2d 172 (7th Cir. 1977), cert. denied, 438 U.S. 916 (1978); Sellers v. Wallman, 510 F.2d 119 (5th Cir. 1975); Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974).

Complainant's counsel points out that respondent has cited no authorit to support its argument that the Appalachian Research & Defense Fund of Kentucky, Inc., should not have accepted this case because of its Congressi "mandate". Counsel states further that Federal Courts have uniformly held that challenges to the propriety of Legal Services programs representing

discovery, and I also ordered production of certain personnel and p
roll records in the custody of the respondent for the complainant's
review. Subsequently, complainant's counsel filed a motion for a s
duces tecum requesting certain payroll records for the years 1980-1
a second set of interrogatories, and a motion for a hearing date.
has filed oppositions to these motions and states that the company
ceased mining operations and no longer has any regular employees wi
knowledge of the further information requested by the complainant.

The respondent has answered complainant's first set of post-hea
interrogatories and has also made available certain company payroll
personnel documents requested by complainant's attorney for their jo
review. Complainant's counsel states that he has reviewed the infor
provided, but has advanced no valid argument justifying any subpoena
tecum for these records. Accordingly, the motion for a subpoena IS

Although I did indicate in one of my previous orders that I wou
consider scheduling a hearing if the parties could not agree on the
compensation due to the complainant, I have reconsidered the matter
have now decided that any further hearing in this case is not warra
Accordingly, complainant's motion for a hearing date IS DENIED.

With regard to the complainant's motion for additional discovery
believe that there is enough information of record to enable me to ru
the compensation question without the need of further discovery. It
obvious to me that counsel for both sides are at odds with each other
the claimed compensation, and any further discovery will be nonproduc
Accordingly, complainant's motion for further discovery IS DENIED.

Attorneys Fees and Costs

Respondent's objections to the awarding of any attorney fees and
costs of litigation is limited to a legal argument that Counsel Oppeg
employer is a quasi-public corporation funded in part by Federal funds
Counsel Roark has filed no objection to the reasonableness of the cla
attorney fees and costs, and Counsel Oppegard has filed a detailed it
statement of expenses and costs.

After careful review and consideration of the arguments and docum
filed by the parties, I conclude and find that respondent's arguments
concerning the eligibility of the Appalachian Research & Defense Fund
Kentucky, Inc., to be compensated for its services in this case are wi
merit and they are rejected. I conclude and find that Mr. Oppegard's
employing agency is entitled to be compensated for the services perfor
on behalf of Mr. Eldridge in pursuing his claim in thi
and find that the claim

Complainant's backpay

The only thing that the parties agree on is that the sum of $3260, representing wages earned by Mr. Eldridge during the time he was discharged should be deducted from any base backpay figure. Although the record contains a letter of June 17, 1983, indicating that Mr. Eldridge is willing to compromise with the respondent by accepting a base backpay figure of $25,804, less interest, in exchange for Mr. Eldridge's foregoing his additional claims for overtime, vacation time, and a bonus, the parties obviously cannot compromise or otherwise settle the matter of compensation.

The initial submission on behalf of Mr. Eldridge concerning his claime backpay is in the form of a letter from Counsel Oppegard to Counsel Roark, stating that his earnings through September 10, 1982, were $25,804. Althou Counsel Oppegard submitted a detailed itemized breakdown of hours worked in support of his claimed attorney fees, the claimed backpay is simply stated as a lump sum figure with no supporting documentation or itemization On the other hand, respondent's submissions concerning Mr. Eldridge's back wages are supported by an itemized breakdown, by payroll period, with supporting affidavits.

With regard to the respondent's calculations of lost wages, Mr. Eldrid counsel takes issue with the assertion by the respondent that Mr. Eldridge would only have worked 36 hours during the pay period ending 3/20/82 and 32 hours during the pay period ending 6/11/82. Counsel Oppegard states that the respondent's payroll records reflect that 74 mine employees worked a full 40 hour week during the first disputed payroll period, and that 86 mine employees worked a full 40 hour week during the second disputed period He therefore concludes that Mr. Eldridge would more than likely have worked full 40 hour weeks during these periods which are in dispute. After review and consideration of the information furnished by the parties concerning these disputed pay periods, I conclude that Mr. Eldridge should be compensa for the full 40 hour weeks in question, rather than the 32 hour and 36 hour weeks as stated by the respondent.

It seems clear to me that the backpay period in this case begins on August 6, 1981, the date of Mr. Eldridge's discharge, and ends on September 9, 1982, the date that the mine closed and mine operations ceased Counsel Oppegard's lump sum backpay claim of $25,804, up to and including September 10, 1982, obviously does not take into account the 1981 layoff periods shown in respondent's detailed statement of wages earned, two days on July 2 and 9, 1982, where respondent claims Mr. Eldridge was not due any vacation pay, and some possible overtime which may have been earned by Mr. Eldridge but omitted in the respondent's calculations.

speculative and estimated overtime hours, layoffs which took place a year or so ago, etc., etc., would be a fruitless exercise, and wo only result in additional delays in bringing this matter to finali plus additional legal costs, none of which are to Mr. Eldridge's be Accordingly, in order to bring this matter to finality, I will dec backpay compensation due Mr. Eldridge on the basis of the informat of record, and in particular, the detailed compensation calculatio submitted by the respondent, as supported by a sworn affidavit of personnel director. On the basis of that information, which I fin credible, I award backpay and other compensation as follows:

Total 1981 Gross Wages.	$ 3,616.00	
Total 1982 Gross Wages.	$ 14,263.40	
12 additional work hours for payroll periods ending 3/20 and 6/11/82 at $11.80 hrly. rate. . .	$ 141.60	
	$ 18,021.00	
Accrued Vacation Days (8)	$ 755.20	
	$ 18,776.20	
Minus wages earned.	-$ 3,260.00	
	$ 15,516.20	
Interest at 12%	$ 1,861.95	
	$ 17,378.15	
Mileage expenses incurred by Mr. Eldridge	$ 92.00	
	$ 17,470.15	TOTA

ORDER

Respondent shall pay to Mr. Eldridge the sum of $17,470.15, l amounts withheld pursuant to state and Federal law, and payment is made within thirty (30) days of the date of this Order.

Respondent shall pay to the Appalachian Research & Defense Fu Kentucky, Inc., Hazard, Kentucky, the sum of $22,172, as attorneys and legal costs, and payment is likewise to be made within thirty days of the date of this Order.

George A. Koutras
Administrative Law Judge

MY SIZEMORE and	:	DISCRIMINATION PROCEEDINGS
AVID RIFE,	:	
Complainants	:	Docket No. KENT 83-130-D
v.	:	
	:	MSHA Case Nos. CD 83-07
LAR BRANCH COAL COMPANY,	:	CD 83-10
Respondent	:	
	:	No. 3 White Oak Mine

DECISION

earances: Tony Oppegard, Esq., and Martha P. Owen, Esq., Hazard, Kentucky, for Complainants; Thomas W. Miller, Miller, Griffin & Marks, Lexington, Kentucky, for Respondent.

ore: Judge Broderick

TEMENT OF THE CASE

Complainants Jimmy Sizemore and David Rife contend they were charged from their employment by Respondent, on November 10, 2, because of activity protected under the Federal Mine Safety Health Act of 1977, 30 U.S.C. § 801 et seq. ("the Act"). suant to notice, the case was called for hearing on April 18, 3, in Hazard, Kentucky. At the commencement of the hearing, parties stated that a settlement had been reached with respec the claim of David Rife, whereby Rife agreed to withdraw his plaint before the Commission, and to withdraw a complaint file h the National Labor Relations Board, and Respondent agreed to nstate Rife effective April 25, 1983, at the same rate of pay was earning when discharged. Based on the settlement agreemen s proceeding will be dismissed insofar as it involves the com- int of David Rife.

Jimmy Sizemore, Roscoe Collett, Donnie Mosley, David Rife, ky Napier, Cecil Harris, and Glenn Caldwell testified on behal Complainant Sizemore; John Chaney, Ronnie Napier and Daryl ier testified on behalf of Respondent. Both parties have file thearing briefs. Based on the entire record and considering contentions of the parties, I make the following decision.

so worked on the third shift as outside man, but his hours con-
nued to be 11:00 p.m. to 7:00 a.m. All of the third shift miners
re unhappy about the change in hours of work. The first shift
rked from 6:00 a.m. to 2:00 p.m. and the second shift from
00 p.m. to 2:00 a.m. Thus, there was an overlap of 4 hours in
e working time of the third and first shifts. Sizemore complained
at he was required to install bolts in 4 hours in the cuts made
the second shift and it was not possible to accomplish this in
e allotted time. When the third shift arrived, Sizemore discon-
nued bolting and did general cleanup work.

During the afternoon of November 8, 1982, Ronnie Napier,
lbert Couch and David Rife were out drinking beer and playing
ol. They were travelling in Ronnie Napier's jeep. Sometime in
e evening, Rife fell asleep in the back of the jeep. Napier and
uch decided to stage a protest at the mine because of the change
the hours of the shift. They drove to the mine site, arriving
me time between 10:00 p.m. and midnight. Napier and Couch had
nsumed approximately 10 bottles of beer each and Rife had drunk
. Couch continued to drink after arriving at the mine. Napier
d a rifle in his possession and Couch had a pistol.

The second shift was underground mining coal when they
rived. Napier called the second shift foreman, Terry Ward, from
e mine office and directed him to bring his crew out of the mine.
en they didn't respond quickly enough, he directed the second
ift outside man to cut off the power to the mine, which resulted
shutting off the mine fan. The second shift then came out of th
ne. Couch called Glenn Caldwell, the mine superintendent, and
nnie Napier told him to come out to the mine. Caldwell called th
lice but they refused to come out to the mine, after being told o
lling the mine office that there was no trouble there. After
rther telephone conversations between Caldwell and Ronnie Napier,
ldwell agreed to come out to the mine at 5:00 a.m., believing tha
is would allow time for Napier to sober up.

Napier, who was armed told the second shift crew that they
re going on strike because of the change in working hours, The
cond shift crew remained outside the mine and were instructed to
main on the mine property. Napier then gave his rifle to Terry
rd who placed it in Napier's jeep. Couch kept his pistol. Both
uch and Napier were intoxicated.

them no one could go to work until Caldwell came, and said
mplied that no one should go home either. The third shift
ers therefore remained in or around the mine office. Between
a.m. and 5:00 a.m., Napier and Couch refused to permit the
ing of coal trucks which were at the mine waiting to be
ed. Napier shot a hole in the door of the mine office and
Napier and Couch shot at insulators on light poles or power
s. A hole or holes had been kicked through the wall of the
office. Beer cans were scattered over the parking lot.
s had apparently been cut.

Caldwell arrived at the mine about 5:00 a.m. and met with the
d shift miners all of whom had remained at the mine site.
ie Napier and Delbert Couch did most of the talking, and voiced
laints of the change in hours of the shift, an insurance problem
er had, and Couch's demand for a raise in pay. When he was
d what his complaint was, Sizemore told Caldwell he would like
ee the hours changed back to the old schedule.

Sizemore had not been drinking or taking drugs. He did not
y a gun. He was not involved in calling the second shift from
mine or in shutting down the mine. He was ready and willing
ork his shift. He was not involved in cutting off the power
he mine or in damaging mine property.

Following his meeting with the third shift miners, Caldwell
ussed the matter with John Chaney, the owner of the mine, and
l Napier, the mine superintendent. Chaney was told, or at
t understood, that the entire third shift was involved in
king and property destruction. Based on that understanding,
old Caldwell to fire all the miners on the third shift. "I
Glenn to fire everybody, that way we would for sure have the
t people." (Tr. 136). Later Ricky Napier was rehired when
ey found out he did not participate in the drinking and
ruction of mine property.

E

Whether Complainant Sizemore was discharged for activity
ected under the Mine Safety Act.

by the protected activity. Secretary/Pasula v. Consolidation Coa Company, 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary/Robinette v. United Castle Coal Co., 3 FMSHRC 80 (1981); Secretary/Bush v. Union Carbide Corporation, 5 FMSHRC ___ (1983).

Complainant contends that he was fired in part for failing t work on November 9, 1982, and that his failure to enter the mine and work his shift was protected activity. He asserts that it wa protected activity because to enter the mine when the power (incl ing the fan) was shut off and the preshift examination had not be performed would be (1) dangerous and (2) in violation of sections 303(d)(1) and 303(t) of the Act.

It certainly is true that it would have been dangerous for Complainant to enter the mine when his shift was scheduled to begin on November 9. The danger, however, arose not so much fror the fact that the fan was shut off and the mine had not been preshifted as from the fact that an intoxicated man with a gun made it clear that no one should enter the mine. Complainant recognizes that this is not a case of a refusal of a miner to enter a dangerous area or perform dangerous work. The mine was shut down in part because of a labor dispute concerning hours of employment, and in part because two employees, including a super- visor, were drunk. It is stretching the notion of protected activity under the Mine Act to hold that it includes not going to work under these circumstances.

Assuming, however, that the "activity" was protected, was Complainant's discharge motivated in any part by such activity?

It is true that Caldwell testified before the Kentucky Unemployment Commission that Sizemore was fired because he didn't go to work or go home. I think it distorts the real situation, however, to conclude that Sizemore (or any of the third shift miners) was fired for failing to enter an unsafe mine. The real is that they were all fired because management believed that the entire third shift was involved in shutting down the mine, drink on the mine site, and wantonly destroying mine property. So far the record before me shows, management was in error about Sizemo participation in any of these activities (as it was, and admitte it was, in error concerning the participation of Ricky Napier).

unfortunately caught by a collective "quit dragnet and discharg
though, according to this record, he was entirely innocent of the
charges properly levelled at some of his fellow miners (including
his foreman).

I conclude that the discharge of Complainant Sizemore was no
motivated in any part by activity protected under the Act. There
fore, no violation of section 105(c) has been established.

ORDER

Based upon the above findings of fact and conclusions of law
(1) the complaint of David Rife is WITHDRAWN and the proceeding i
DISMISSED pursuant to a settlement agreement between Rife and
Respondent; (2) the Complaint of Jimmy Sizemore and this proceedi
is DISMISSED for failure to establish a violation of section 105(
of the Act.

James A. Broderick
James A. Broderick
Administrative Law Judge

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Petitioner	:	A.C. No. 04-04218-05014 F
v.	:	
	:	MINE: Billie
AMERICAN BORATE COMPANY,	:	
Respondent	:	

DECISION

Appearances: Theresa Kalaski, Esq., Office of the Solicitor
U. S. Department of Labor, Los Angeles, California,
for Petitioner;
Stephen G. Saleson, Esq., San Bernardino, California,
for Respondent.

Before: Judge Vail

STATEMENT OF CASE

On December 2, 1980, a miner at American Borate's Billie mine was kil when struck by a slab of rock that fell from the roof. The Secretary of Labor, after investigating the accident, issued to American Borate a 107(a imminent danger withdrawal order. The Secretary also alleged American Bor violated 30 C.F.R. § 57.3-20 which reads:

> Mandatory. Ground support shall be used if the operating experience of the mine, or any, particular area of the mine, indicates that it is required. If it is required, support, including timbering, rock bolting, or other methods shall be consistent with the nature of the ground and the mining method used.

In this proceeding, American Borate contests both the Secretary's finding a violation and the proposed penalty based upon it.

A hearing was held, pursuant to notice, in Las Vegas, Nevada, on Marc 82 Witness for the Secretary was Vaughn Duaine Cowley, official of ety and Health Administration (MSHA), who investigated the acciden American Borate were Dale Parson Bess, shift superintendent day the fatality occurred, Charles Garrett, mine manager at pe Regalado, employed in the safety department to provide orty hours and annual refresher training, Henry McIntire,

FINDINGS OF FACT

1. American Borate's Billie mine is an underground borate minerals, imarily colemanite, mine near Death Valley, California. Mining proceeds by t and fill using room and pillar method. Drifts are cut with a continuous ning machine followed by roof bolting using mats with five foot roof bolts four foot centers.

2. On December 2, 1980, miners Donald Pribbenow and Orval Duncan were signed the task of rock bolting in the No. 1 south cross cut off the No. 1 ift west of the 1160 level. Immediately prior to the fatal accident that curred this day, they had installed approximately twenty bolts, four or ve mats, and one roll of wire across the back near the face. When Pete ick, the shift foreman left this area of the mine, Pribbenow and Duncan had proximately two more bolts to put in with the existing mat in place. ortly thereafter, a slab of rock fell from the roof striking Duncan and using his death.

3. The process used in the Billie mine for roof bolting consisted of curing steel mats onto the back of the drift with a split set roof bolt th a ring and six by six inch or eight by eight inch plate on the bottom to ld the mat against the roof. Mats are steel straps five to eight feet long th holes drilled for the roof bolts. These mats are placed over the wire sh used to control the roof (Tr. 20-21).

4. Duncan and Pribbenow had both received the required forty hour aining course in mine safety followed by an eight hour refresher course. th miners had worked for American Borate approximately 12 months (Tr. 9-120).

5. At approximately 5:45 a.m., Duncan and Pribbenow drove a Young buggy a point where the back railing on the work platform was approximately 2 to 1/2 feet from the face of the drift. The roof bolts and steel mats had en installed on the roof up to a point 4 to 6 feet from the face. Duncan d Pribbenow were standing on the work platform of the Young buggy operating jackleg used to drill holes in the roof for the bolts. The two miners were proximately two to three feet back of the back railing of the Young buggy illing a hole in the roof two feet back from the face. This hole was illed at a seventy degree angle. While standing in this position, Duncan d Pribbenow were under supported roof (Tr. 51-59, and Resp. Ex. R4). A

of the ground and mining method because temporary support not used to protect miners working ahead of permanent supp ground. The mine operator shall immediately institute a p gram of temporary ground support to protect mine workers w ing under ground not permanently supported and shall devel and institute standardized ground support plans for each t of mine opening. The ground support plan shall be submitt to an authorized representative of the Secretary for revie and shall be updated as mining conditions change.

ISSUES

1. Was American Borate properly charged with a violation of support requirements under the standard cited?

2. Did the violation occur as alleged and, if so, what is th appropriate penalty?

DISCUSSION

The Secretary has the burden in this case to prove that a vio the cited standard occurred. Based upon a careful review of all c evidence of record, I find that the alleged violation was not prov the citation should be vacated. This conclusion is based principa testimony of the Secretary's only witness. Inspector Cowley testi upon arriving at the Billie mine after notification of the fatal a went underground to investigate. Upon arriving at the location in where the fall had occurred, he discovered that the Young buggy or miners had been standing and working had been moved to allow the d miner to be removed. Cowley was able to determine where the Young previously been standing from the tire tracks in the wet ground. given information surrounding the facts of the accident by Pribben been working with Duncan when the roof fall occurred. Pribbenow t that after Quick, the shift foreman left, he and Duncan decided to more mats between the last existing mat and the face. They backed buggy up to the face and started to drill a hole for a roof bolt. t changed the starter drill on the jackleg drill to a four foot bbenow started drilling in the hole again when the slab fell hi left side rail of the Young buggy and bouncing into the flatbe iking Duncan.

next day, after a conversation with Probenow, Cowley went back to the scene and located the drill hole. On direct examination, Cowley stated that after finding the drill hole, he put a tamping stick or scaling bar in the hole and ran an imaginary line down to where he though the jackleg drill would be and concluded that the two miners were under unprotected roof (Tr. 33). Based upon this, Cowley concluded the miners should have used temporary support, either steel hydraulic jacks or wooden timber stalls, to continue the roof bolting in this area. Several days later, on December 4, 1980, Cowley issued the 107(a) order and indicated that when American Borate came up with a positive plan for ground control, he would modify the order (Tr. 37).

The record shows that American Borate had an approved roof control plan which had been in existence for sometime. The method of roof control being used at the time of the accident was consistent with the roof control plan and in compliance with its requirements. Cowley stated that he did not cite American Borate for a violation of their roof control plan but rather to improve on the plan by incorporating temporary ground control methods along with what already was required (Tr. 74).

At the hearing, Cowley testified on cross-examination that the back of the Young buggy was approximately 2 to 2 1/2 feet from the face of the drift and that the hole which was being drilled was also approximately 2 1/2 feet from the face. He also stated that the last row of mats supporting the roof was 4 to 6 feet from the face, and that he determined the hole being drilled was at a 70 degree angle to the vertical. He determined that the jackleg drill was most likely located in the middle of the flat bed of the Young buggy and probably four feet from the back railing. In response to questions by counsel for American Borate, Cowley testified as follows (Tr. 58-60):

> Q. Apparently, Mr. Cowley, perhaps I am wrong but apparently based on what we have drawn here from your facts and figures it appears that the person at the time the drilling was done would have been standing under supported ground, is that correct, sir?
>
> A. It shows that, yes.
>
> Q. Do you wish to change your opinion now as to whether at the time of the accident Mr. Duncan was standing under supported or unsupported ground?
>
> A. No, my figures is wrong.
>
> Q. Your figures?

A. Yes.

Q. Thank you, sir. You may resume the witness stand.

(Witness resumed the witness stand)

Q. So as of today then it is your belief that in fact based on representations as we have gone through them today that Mr. Dunca was standing under supported ground at the time of the accident rather than unsupported ground?

A. I guess.

Q. And if he was standing under unsupported ground then the fact a to whether there had been temporary ground support placed or not would have no bearing on the accident, isn't that true?

A. On those measurements, yes.

Q. Would it not be correct, sir, based on our drawing today and the accuracy of it that in fact a violation did not occur on the morning of December 2nd, 1980?

A. According to that diagram there was no violation.

Cowley was asked the following questions by this writer (Tr. 76-79).

Q. Now, is it your contention that Duncan was standing under unsupported roof when he was standing there by A?

A. Not according to that, sir.

Q. Well, what is your contention then as far as what you stated here as far as the violation is concerned there?

A. My measurements was lousy.

Q. If Duncan were standing under supported roof do you still feel that there was a violation by the Company of the Section fifty-seven point three dash twenty?

A. If he was standing under supported ground there was none.

instance was in compliance with the approved roof control plan and what had been successful in the past and was considered by management as proper procedure for the area Duncan and Pribbenow were working in. In the normal sequence of its mining operations American Borate has taken steps to provid adequate support consistent with the nature of the ground in compliance wit the cited regulation and thus, the Secretary has failed to sustain the burd of proof by a preponderance of the evidence that the regulation was violate

ORDER

Citation No. 380358 and the proposed penalty therefore are VACATED.

Virgil E. Vail
Administrative Law Judge

Distribution:

Theresa Kalaski, Esq. (Certified Mail)
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Stephan G. Saleson, Esq. (Certified Mail)
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July 13, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCE Docket No. CENT 83- A.C. No. 13-01855-0
v.	:	
	:	No. 6 Mine
MICH COAL COMPANY, Respondent	:	

DENIAL OF MOTION TO DISMISS

ORDER TO SUBMIT INFORMATION

In accordance with what apparently now is becomin standard practice the Solicitor has filed a motion to the petition for assessment of a civil penalty for the violation involved in this matter predicated solely up section 100.4 of the regulations of the Mine Safety an Health Administration, 30 C.F.R. § 100.4. According t Solicitor this regulation provides for the assessment $20 single penalty for a violation which is not reason likely to result in reasonably serious injury or illne The Solicitor has orally advised that his records disc no evidence on gravity or negligence. The citation wa issued for a failure to submit a valid respirable dust sample or giving a valid reason for not sampling the d nated work position for the bimonthly period June-July 1982.

I am unable to grant the Solicitor's motion on th basis of the present record. The Act makes very clear penalty proceedings before the Commission are de novo. Commission itself recently recognized that it is not b by penalty assessment regulations adopted by the Secre but rather that in a proceeding before the Commission amount of the penalty to be assessed is a de novo dete mination based upon the six statutory criteria specifi section 110(i) of the Act and the information relevant thereto developed in the course of the adjudicative pr ceeding. Sellersburg Stone Company, 5 FMSHRC 287 (Mar 1983). Indeed, if this were not so, the Commission wo nothing but a rubber stamp for the Secretary. This ca

information regarding negligence and gravity. I cannot determine that a nominal penalty of $20 is appropriate when I am given no information regarding negligence and gravity or any of the other statutory criteria.

The fact that MSHA may have determined that this viola is not "significant and substantial" as that term presently is defined by the Commission, is not determinative or even relevant in these proceedings. I agree with Administrative Law Judge Broderick that whether a cited violation is check as significant and substantial is per se irrelevant to the determination of the appropriate penalty to be assessed. United States Steel Mining Co., Inc., 5 FMSHRC 934 (May 198 PDR granted June 22, 1983.

Regardless of the Secretary's regulations, once this Commission's jurisdiction attaches we have our own statutor responsibilities to fulfill and discharge. This can only b done on the basis of an adequate record.

ORDER

In light of the foregoing, it is Ordered that the Solicitor's motion for dismissal be Denied.

It is further Ordered that within 30 days from the dat of this order the Solicitor file information adequate for m to determine whether the proposed penalty is justified and dismissal warranted. Otherwise, this case will be assigned and set down for hearing on the merits.

Paul Merlin
Chief Administrative Law Judge

Distribution:

Robert S. Bass, Esq., Office of the Solicitor, U. S. Depart of Labor, Room 2106, 911 Walnut Street, Kansas City, MO 64106 (Certified Mail)

Mr. Dale Mich, Mich Coal Company, P. O. Box 16, Oskaloosa, IA 52577 (Certified Mail)

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

July 15, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 83-20 A.C. No. 29-01820-03505
v.	:	
ARROYO MINING COMPANY, INC., Respondent	:	Arroyo Mine No. 1

DENIAL OF SETTLEMENT

ORDER TO SUBMIT INFORMATION

In accordance with what apparently now is becoming standard practice, the Solicitor has filed a motion for settlement in the amount of $20 for the one violation involved in this matter. The motion is predicated solely upon section 100.4 of the regulations of the Mine Safety and Health Administration, 30 C.F.R. § 100.4 which provides for the assessment of a $20 penalty for a violation which is not reasonably likely to result in a reasonably serious injury or illness. The citation was issued for a failure to submit the required respirable dust samples.

I am unable to grant the Solicitor's motion on the basis of the present record. The Solicitor has furnished no information. The citation itself contains boxes which were checked by the inspector indicating the feared event was reasonably likely and that negligence was moderate. I cannot approve a settlement based upon checks in boxes but even if I could the checks in this case would contra-indicate a $20 penalty.

Even more importantly, the Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty assessment regulations adopted by the Secretary but rather that in a proceeding before the Commission the amount of the penalty to be assessed is a de novo deter-mination based upon the six statutory

The fact that MSHA may have determined that this violation is not "significant and substantial" as that term presently is defined by the Commission, is not determinative or even relevant in these proceedings. I agree with Administrative Law Judge Broderick that whether a cited violation is checked as significant and substantial is per se irrelevant to the determination of the appropriate penalty to be assessed. United States Steel Mining Co., Inc., 5 FMSHRC 934 (May 1983), PDR granted June 22, 1983.

Regardless of the Secretary's regulations, once this Commission's jurisdiction attaches we have our own statutory responsibilities to fulfill and discharge. This can only be done on the basis of an adequate record.

ORDER

In light of the foregoing, it is Ordered that the Solicitor's motion for settlement be Denied.

It is further Ordered that within 30 days from the date of this order the Solicitor file information adequate for me to determine whether the proposed penalty is justified and settlement warranted. Otherwise, this case will be assigned and set down for hearing on the merits.

Paul Merlin
Chief Administrative Law Judge

Distribution:

Jack F. Ostrander, Esq., Office of the Solicitor, U. S. Department of Labor, 555 Griffin Square Building, Dallas, TX 75202 (Certified Mail)

Mr. Jack A. Lawrence, Arroyo Mining Company, Inc., Star Route, Box 16B, Bernalillo, NM 87004 (Certified Mail)

ADMINISTRATION (MSHA),	:	Docket No. PENN 83-
Petitioner	:	A.C. No. 36-04702-0
v.	:	
	:	Skidmore Slope
MISHBUCHA ENTERPRISES, LTD.	:	
Respondent	:	

DENIAL OF SETTLEMENT

ORDER TO SUBMIT INFORMATION

In accordance with what apparently now is becomir standard practice, the Solicitor has filed a motion fc settlement in the amount of $40, $20 apiece for the tv violations involved in this matter. This motion is pr icated solely upon section 100.4 of the regulations of Mine Safety and Health Administration, 30 C.F.R. § 10(which provides for the assessment of a $20 single pena for a violation MSHA believes is not reasonably likely result in a reasonably serious injury or illness. The violations involve a failure to take a required valid sample.

I am unable to approve the motion for settlement basis of the present record. In my opinion $20 is a r penalty which indicates a lack of gravity. I note tha the citation form the inspector checked the box indica that the occurrence of the event against which the mar standard is directed was unlikely. However, I am unwi to accept a check in a box on a form without knowing a the reasons for the inspector's conclusion. Moreover have been told nothing about negligence or any of the statutory factors which would enable me to make an in judgement as to proper penalty amounts.

The MSHA regulation in question is not binding up Commission. Indeed, it is not even relevant. The Act very clear that penalty proceedings before the Commiss are de novo. The Commission itself recently recognize it is not bound by penalty assessment regulations adop the Secretary but rather that in a proceeding before

Commission the amount of the penalty to be assessed is a de novo determination based upon the six statutory criteria specified in section 110(i) of the Act and the information relevant thereto developed in the course of the adjudicative proceeding. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983). Indeed, if this were not so, the Commission would be nothing but a rubber stamp for the Secretary.

The fact that MSHA may have determined that these violations are not "significant and substantial" as that term presently is defined by the Commission, is not determinative or even relevant in these proceedings. I agree with Administrative Law Judge Broderick that whether a cited violation is checked as significant and substantial is per se irrelevant to the determination of the appropriate penalty to be assessed. United States Steel Mining Co., Inc., 5 FMSHRC 934 (May 1983), PDR granted June 22, 1983.

Regardless of the Secretary's regulations, once this Commission's jurisdiction attaches we have our own statutory responsibilities to fulfill and discharge. This can only be done on the basis of an adequate record.

ORDER

In light of the foregoing, it is Ordered that the Solicitor's motion for settlement be Denied.

It is further Ordered that within 30 days from the date of this order the Solicitor file information adequate for me to determine whether the proposed penalties are justified and settlement warranted. Otherwise, this case will be assigned and set down for hearing on the merits.

Paul Merlin
Chief Administrative Law Judge

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

July 15, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. MACASPHALT, INC., Respondent	:	CIVIL PENALTY PROCEEDING Docket No. SE 83-26-M A.C. No. 08-00826-05501 Newburn Pit

DENIAL OF SETTLEMENT

ORDER TO SUBMIT INFORMATION

In accordance with what apparently now is becoming standard practice, the Solicitor has filed a motion for settlement in the amount of $60, $20 each, for the three violations involved in this matter.

The Solicitor does not discuss any of the violations. He only attaches the proposed assessment sheet and the citations. He states that the inspector's evaluation is attached but it is not.

In my opinion $20 is a nominal penalty which indicates a lack of gravity. The first violation was issued for an inoperative automatic reverse signal alarm on a front end loader. The second violation was issued because brakes on the front end loader needed adjustment or repair. The third violation was issued for a missing section of hand railing on the walkway on the first floor of the plant in front of the roll screen. On the face of these violations I would have no basis to conclude they are nonserious. Moreover, I have been told nothing by the Solicitor about the rest of the six statutory criteria.

The assessment sheet indicates that the $20 penalties were issued in accordance with the so-called "single penalty assessment" under section 100.4 of the regulations of the Mine Safety and Health Administration, 30 C.F.R. § 100.4

even relevant in these proceedings. The fact the operator has paid the original assessed amounts cannot preclude the Commission from acting in accordance with the governing statute.

The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty assessment regulations adopted by the Secretary but rather that in a proceeding before the Commission the amount of the penalty to be assessed is a de novo determination based upon the six statutory criteria specified in section 110(i) of the Act and the information relevant thereto developed in the course of the adjudicative proceeding. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983). Indeed, if this were not so, the Commission would be nothing but a rubber stamp for the Secretary.

The fact that MSHA may have determined that these violations are not "significant and substantial" as that term presently is defined by the Commission, is not determinative or even relevant in these proceedings. I agree with Administrative Law Judge Broderick that whether a cited violation is checked as significant and substantial is per se irrelevant to the determination of the appropriate penalty to be assessed. United States Steel Mining Co., Inc., 5 FMSHRC 934 (May 1983), PDR granted June 22, 1983.

Regardless of the Secretary's regulations, once this Commission's jurisdiction attaches we have our own statutory responsibilities to fulfill and discharge. This can only be done on the basis of an adequate record.

ORDER

In light of the foregoing, it is Ordered that the Solicitor's motion for settlement be Denied.

It is further Ordered that within 30 days from the date of this order the Solicitor file information adequate for me to determine whether the proposed penalties are justified and settlement warranted. Otherwise, this case will be assigned and set down for hearing on the merits.

Mr. Raymond H. Garriott, Safety Director, Macasphalt, Inc., P. O. Box 2579, Myrtle Street & SCL Railroad, Sarasota, FL 33578 (Certified Mail)

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. VA 83-7
	:	A.C. No. 44-0404856-03501
v.	:	
	:	Buchanan No. 1 Mine
C. J. LANGENFELDER & SON, INC., Respondent	:	

DENIAL OF SETTLEMENT

ORDER TO SUBMIT INFORMATION

In accordance with what apparently now is becoming standard practice, the Solicitor has filed a motion for settlement in the amount of $240 for the 12 violations involved in this matter. This motion is predicated solely upon section 100.4 of the regulations of the Mine Safety and Health Administration, 30 C.F.R. § 100.4 which provides for the assessment of a $20 single penalty for a violation MSHA believes is not reasonably likely to result in a reasonably serious injury or illness. I have reviewed the 12 violation They were issued for a variety of conditions including inoperative automatic warning device, lack of a suitable fire extinquisher and inoperative lights.

I am unable to approve the motion for settlement on the basis of the present record. In my opinion $20 is a nominal penalty which indicates a lack of gravity. I have been told nothing about gravity, negligence or any of the other statutory factors which would enable me to make an informed judgment as to proper penalty amounts. The fact the operato has paid the $240 cannot preclude the Commission from acting in accordance with the governing statute.

Section 100.4 is not binding upon this Commission. Indeed, it is not even relevant. The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty assessment regulations adopted by the Secretary but rather that in a proceeding before the Commission the amount of the penalty to be assessed is a de nov

determination based upon the six statutory criteria sp
in section 110(i) of the Act and the information relev
thereto developed in the course of the adjudicative pr
Sellersburg Stone Company, 5 FMSHRC 287 (March 1983).
Indeed, if this were not so, the Commission would be n
but a rubber stamp for the Secretary.

The fact that MSHA may have determined that these
violations are not "significant and substantial" as th
term presently is defined by the Commission, is not de
minative or even relevant in these proceedings. I agr
with Administrative Law Judge Broderick that whether a
violation is checked as significant and substantial is
per se irrelevant to the determination of the appropri
penalty to be assessed. United States Steel Mining Co
Inc., 5 FMSHRC 934 (May 1983), PDR granted June 22, 19

Regardless of the Secretary's regulations, once t
Commission's jurisdiction attaches we have our own sta
responsibilities to fulfill and discharge. This can o
done on the basis of an adequate record.

ORDER

In light of the foregoing, it is Ordered that the
Solicitor's motion for settlement be Denied.

It is further Ordered that within 30 days from th
of this order the Solicitor file information adequate
me to determine whether the proposed penalties are jus
and settlement warranted. Otherwise, this case will b
assigned and set down for hearing on the merits.

Paul Merlin
Chief Administrative Law Judg

Distribution:

Agnes M. Johnson-Wilson, Esq., Office of the Solicitor
U. S. Department of Labor, Rm. 14480-Gateway Building,
3535 Market Street, Philadelphia, PA 19104 (Certified

MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Docket No. VA 83-16
	:	A.C. No. 44-05217-03501
v.	:	
	:	No. 1 Strip
HUMPHREYS ENTERPRISES, INC., Respondent	:	

DENIAL OF SETTLEMENT

ORDER TO SUBMIT INFORMATION

The Solicitor has filed a motion for settlement for th eight violations involved in this matter. With respect to seven violations the Solicitor seeks settlements in the amount of $20 apiece. For the eighth violation the Solicit seeks a settlement in the amount of $147.

First, I will discuss the seven violations. The Solic does not discuss the circumstances of any of these violatic He merely states that they did not constitute an imminent danger and are not significant and substantial, paraphrasir the Commission's present interpretation of the term "signif and substantial." In accordance with what apparently now i becoming standard practice, the Solicitor relies upon secti 100.4 of the regulations of the Mine Safety and Health Administration, 30 C.F.R. § 100.4 which provides for the assessment of a $20 single penalty for a violation MSHA believes is not reasonably likely to result in a reasonably serious injury or illness.

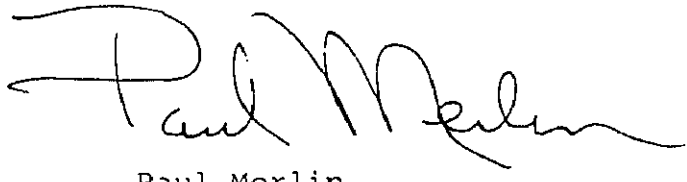
I am unable to approve the proposed settlements for these seven violations on the basis of the present record. In my opinion $20 is a nominal penalty which indicates a lack of gravity. I have been told nothing about gravity, negligence or any of the other six statutory factors which would enable me to make an informed judgement as to proper penalty amounts.

The MSHA regulation in question is not binding
Commission. Indeed, it is not even relevant. The A
very clear that penalty proceedings before the Commi
are de novo. The Commission itself recently recogni
it is not bound by penalty assessment regulations ad
the Secretary but rather that in a proceeding before
Commission the amount of the penalty to be assessed
de novo determination based upon the six statutory c
specified in section 110(i) of the Act and the infor
relevant thereto developed in the course of the adju
proceeding. Sellersburg Stone Company, 5 FMSHRC 287
1983). Indeed, if this were not so, the Commission
nothing but a rubber stamp for the Secretary.

The fact that MSHA may have determined that the
violations are not "significant and substantial" as
term presently is defined by the Commission, is not
minative or even relevant in these proceedings. I a
with Administrative Law Judge Broderick that whether
violation is checked as significant and substantial
per se irrelevant to the determination of the appro
penalty to be assessed. United States Steel Mining
Inc., 5 FMSHRC 934 (May 1983), PDR granted June 22,
Regardless of the Secretary's regulations, once this
mission's jurisdiction attaches we have our own stat
responsibilities to fulfill and discharge. This can
done on the basis of an adequate record.

Finally, I am unable to approve the proposed $1
settlement for the eighth violation which was issued
ineffective brakes on a 35-ton truck. The Solicitor
that gravity and negligence were high but that the o
demonstrated good faith abatement and has a relative
history of complying with the Act. I have been told
about the operator's size and its ability to continu
business. When the Solicitor advises that gravity a
negligence were high a penalty of $147 seems relativ
unless other factors mitigate against imposition of
severe penalty. The Solicitor should inform me as t
statutory criteria.

It is further Ordered that within 30 days from the date of this order the Solicitor file information adequate for me to determine whether the proposed penalties are justified and settlement warranted. Otherwise, this case will be assigned and set down for hearing on the merits.



Paul Merlin
Chief Administrative Law Judge

Distribution:

Craig W. Hukill, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Blvd., Rm. 1237A, Arlington, VA 22203 (Certified Mail)

Mr. Mike Thomas, Humphreys Enterprises, Inc., P. O. Box 668, Norton, VA 24273 (Certified Mail)

July 15, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. VA 83-17
	:	A.C. No. 44-03604-03504
v.	:	
	:	Mine No. 1
VIKING MINING CORPORATION, Respondent	:	

DENIAL OF SETTLEMENT

ORDER TO SUBMIT INFORMATION

In accordance with what apparently now is becoming standard practice, the Solicitor has filed a motion for settlement in the amount of $20 for the one violation involved in this matter. The motion is predicated solely upon section 100.4 of the regulations of the Mine Safety an Health Administration, 30 C.F.R. § 100.4 which provides for the assessment of a $20 single penalty for a violation MSHA believes is not reasonably likely to result in a reasonably serious injury or illness. This violation was issued becau the operator did not take one valid respirable dust sample from the designated area for the bimonthly sampling period of October-November 1982.

I am unable to approve the motion for settlement on th basis of the present record. In my opinion $20 is a nomina penalty which indicates a lack of gravity. I have been tol nothing about gravity, negligence or any other factors whic would enable me to make an informed judgement as to proper penalty amounts.

The MSHA regulation in question is not binding upon th Commission. Indeed, it is not even relevant. Moreover, th fact that the operator has tendered payment cannot preclude the Commission from acting in accordance with the governing statute.

The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself

roceeding before the Commission the amount of the penalty o be assessed is a de novo determination based upon the six tatutory criteria specified in section 110(i) of the Act nd the information relevant thereto developed in the course f the adjudicative proceeding. Sellersburg Stone Company, FMSHRC 287 (March 1983). Indeed, if this were not so, the ommission would be nothing but a rubber stamp for the ecretary.

The fact that MSHA may have determined that this iolation is not "significant and substantial" as that term resently is defined by the Commission, is not determinative r even relevant in these proceedings. I agree with Administrative Law Judge Broderick that whether a cited violation s checked as significant and substantial is per se irrelevant o the determination of the appropriate penalty to be assessed. nited States Steel Mining Co., Inc., 5 FMSHRC 934 (May 983), PDR granted June 22, 1983.

Regardless of the Secretary's regulations, once this ommission's jurisdiction attaches we have our own statutory esponsibilities to fulfull and discharge. This can only be one on the basis of an adequate record.

ORDER

In light of the foregoing, it is Ordered that the olicitor's motion for settlement be Denied.

It is further Ordered that within 30 days from the date f this order the Solicitor file information adequate for me o determine whether the proposed penalty is justified and ettlement warranted. Otherwise, this case will be assigned nd set down for hearing on the merits.

Paul Merlin
Chief Administrative Law Judge

istribution:

eo McGinn, Esq., Office of the Solicitor, U. S. Department

ADMINISTRATION (MSHA), Petitioner	:	Docket No. WEST 83-37-M
	:	A.C. No. 45-00727-05501
v.	:	
	:	East Salah Pit & Plant
YAKIMA CEMENT PRODUCTS COMPANY, INC., Respondent	:	

DENIAL OF SETTLEMENT

ORDER TO SUBMIT INFORMATION

The Solicitor has filed a motion to approve a settlement for the five violations involved in this matter. The proposed settlement in the amount of $110 is the originally assessed amount. 1/

The Solicitor has given me no basis whatsoever to approve the proposed settlement. None of the violations are explained or analyzed. The Solicitor merely states that the operator has paid the originally assessed amount. Four of the violations were assessed at $20 apiece and one violation was assessed at $30. In my opinion these amounts denote a lack of gravity. The citations are for lack of guarding on a belt drive, missing or misplaced covers on various equipme which might create a shock hazard and an unintentional ground fault. I do not know whether these conditions are serious or not but I certainly could not find lack of gravit on the face of the subject violations. On two of the citations the inspector has checked boxes relating to gravit and negligence. I do not believe I can approve settlements based upon checking boxes when no reasons are given. Also here in one case negligence was checked as moderate and in the other occurrence of the feared event was thought likely.

It appears from the assessment sheet that the four violations which are assessed at $20 each were done so as the result of the so-called "single penalty assessment" which is set forth in section 100.4 of the regulations of the Mine Safety and Health Administration, 30 C.F.R. § 100.4 which provides for the assessment of a $20 single

1/ The Solicitor's motion mistakenly sets forth the amount as $100. This is obviously wrong since both the assessment

penalty for a violation MSHA believes is not reasonably likely to result in a reasonably serious injury or illness. This regulation is not binding upon the Commission and is not a basis upon which I could approve a settlement.

The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty assessment regulations adopted by the Secretary but rather that i a proceeding before the Commission the amount of the penalt to be assessed is a de novo determination based upon the si statutory criteria specified in section 110(i) of the Act and the information relevant thereto developed in the cours of the adjudicative proceeding. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983). Indeed, if this were not so, th Commission would be nothing but a rubber stamp for the Secretary.

The fact that MSHA may have determined that these violations are not "significant and substantial" as that term presently is defined by the Commission, is not determinative or even relevant in these proceedings. I agree with Administrative Law Judge Broderick that whether a cite violation is checked as significant and substantial is per irrelevant to the determination of the appropriate penalty to be assessed. United States Steel Mining Co., Inc., 5 FMSHRC 934 (May 1983), PDR granted June 22, 1983.

Regardless of the Secretary's regulations, once this Commission's jurisdiction attaches we have our own statutor responsibilities to fulfill and discharge. This can only b done on the basis of an adequate record.

ORDER

In light of the foregoing, it is Ordered that the Solicitor's motion for settlement be Denied.

It is further Ordered that within 30 days from the dat of this order the Solicitor file information adequate for m to determine whether the proposed penalties are justified and settlement warranted. Otherwise, this case will be assigned and set down for hearing on the merits.

Yakima Cement Products Company, Inc., 1202 South 1st Street
Box 436, Yakima, WA 98901 (Certified Mail)

MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Docket No. WEST 83-64-M
	:	A.C. No. 04-01959-05501
v.	:	
	:	Sisquic Pit and Mill
KAISER SAND & GRAVEL CO., Respondent	:	

DENIAL OF SETTLEMENT

ORDER TO SUBMIT INFORMATION

The Solicitor has filed a motion for settlement for the one violation involved in this matter. She advises that the operator has paid the originally assessed amount of $20 and has withdrawn its notice of contest.

Since the Commission's jurisdiction has attached, the operator's proposed withdrawal of its notice of contest is not determinative. Under section 110 of the Act the Commission has the responsibility to insure that all settlements comply with the requirements of the law including the six statutory criteria. In her motion the Solicitor sets forth information regarding history, size and ability to continue in business. With respect to abatement, negligence and gravity the Solicitor directs my attention to the "inspector's statement, Exhibit 1 attached hereto, which reflects the testimony of the inspector if he were to testify." There is, however, no inspector's statement attached to the motion. Such carelessness is unfortunately all too typical of these settlement motions. The Commission and its Judges should not have to waste time repeatedly attempting to obtain information necessary to dispose of settlement motions.

Moreover, on the face of the matter, I cannot approve the proposed settlement. In my opinion, $20 is a nominal penalty which denotes a lack of gravity. The dry vegetation cited by the inspector appears to fall squarely within the mandatory standard. The proximity of this vegetation to the electrical substation does not necessarily mandate a finding that the condition was serious but if there was no gravity there must be an explanation why.

of this order the Solicitor file information adequate for m
to determine whether the proposed penalty is justified and
settlement warranted. Otherwise, this case will be assigne
and set down for hearing on the merits.

Paul Merlin
Chief Administrative Law Judge

Distribution:

Theresa Kalinski, Esq., Office of the Solicitor, U. S.
Department of Labor, Room 3247 Federal Building, 300 North
Los Angeles Street, Los Angeles, CA 90012 (Certified Mail

Mr. Clair E. Hay, Kaiser Sand & Gravel Company, P. O. Box
580, Pleasanton, CA 94566 (Certified Mail)

MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Docket No. WEVA 83-171 A.C. No. 46-05963-03503
v.	:	
IDGE LAND COMPANY, Respondent	:	Ridge Land No. 22

DENIAL OF SETTLEMENT

ORDER TO SUBMIT INFORMATION

In accordance with what apparently now is becoming tandard practice, the Solicitor has filed a motion for ettlement in the amount of $60 for the three violations nvolved in this matter. This motion is predicated solely pon section 100.4 of the regulations of the Mine Safety nd Health Administration, 30 C.F.R. § 100.4 which provides or the assessment of a $20 single penalty for a violation hich MSHA believes is not reasonably likely to result in reasonably serious injury or illness. The first violation as issued for failure to properly install a fire sensor ystem. The second violation was issued for failure to ave proper lighting on a continuous mining machine and ailure to properly illuminate the working place. The hird violation was issued for failure to have proper ighting on the roof bolting machine and failure to roperly illuminate the working place.

I am unable to approve the motion for settlement on he basis of the present record. In my opinion $20 is a ominal penalty which indicates a lack of gravity. I have een told nothing about gravity, negligence or any other actors which would enable me to make an informed judgment s to proper penalty amounts.

The Act makes very clear that penalty proceedings efore the Commission are de novo. The Commission itself ecently recognized that it is not bound by penalty assess- ent regulations adopted by the Secretary but rather that n a proceeding before the Commission the amount of the enalty to be assessed is a de novo determination based pon the six statutory criteria specified in section 110(i)

were not so, the Commission would be nothing but a stamp for the Secretary.

The fact that MSHA may have determined that t violations are not "significant and substantial" a term presently is defined by the Commission, is nc minative or even relevant in these proceedings. I with Administrative Law Judge Broderick that wheth cited violation is checked as significant and subs is per se irrelevant to the determination of the a penalty to be assessed. United States Steel Minir Inc., 5 FMSHRC 934 (May 1983), PDR granted June 22

Regardless of the Secretary's regulations, or Commission's jurisdiction attaches we have our own responsibilities to fulfill and discharge. This c be done on the basis of an adequate record.

ORDER

In light of the foregoing, it is Ordered that Solicitor's motion for settlement be Denied.

It is further Ordered that within 30 days fro of this order the Solicitor file information adequ me to determine whether the proposed penalties are and settlement warranted. Otherwise, this case wi assigned and set down for hearing on the merits.

Paul Merlin
Chief Administrative Law

Distribution:

David A. Pennington, Esq., Office of the Solicitor Department of Labor, Rm. 14480-Gateway Building, 3 Street, Philadelphia, PA 19104 (Certified Mail)

Mr. Edward A. Asbury, President, Ridge Land Compar Drawer 240, Anawalt, WV 24808 (Certified Mail)

ADMINISTRATION (MSHA),	:	Docket No. CENT 82-105
Petitioner	:	A. C. No. 03-01384-03019
	:	
v.	:	J & B No. 1 Mine
	:	
R & S COAL COMPANY, INC.,	:	
Respondent	:	

DENIAL OF SETTLEMENT
ORDER TO SUBMIT INFORMATION

The Solicitor has filed a motion to approve settlements for the five violations involved in this matter. The propos settlements are for $20 apiece.

Based upon the present record, I am unable to approve the proposed settlements. In my opinion, $20 is a nominal penalty which indicates a lack of gravity. Two citations were issued for failure to secure compressed gas cylinders. The third violation was for the lack of a portable fire extinguisher on a diesel storage tank. The fourth citation was issued for the absence of an automatic warning device on a front end loader. The fifth citation was issued because a gasoline container was not a safety can. On the face of these citations, therefore, it appears that there may well have been some degree of gravity present in all of them. The proposed penalties, therefore, do not appear appropriate or in the public interest.

The Solicitor further states that the violations were not considered significant and substantial since they were not reasonably likely to result in a reasonably serious injury or illness. This motion does not mention section 100.4 of the regulations of the Mine Safety and Health Administration, 30 C.F.R. 100.4, which provides for the assessment of a $20 single penalty for a violation which MSHA believes is not reasonably likely to result in a reasonably serious injury or illness. The rationale employed in this motion is, however, just like that underlying the regulation since it relies upon the fact that the violation was not significant and substantial.

The MSHA regulation and the rationale expressing it are not binding upon this Commission. Indeed, they are not even relevant. The Act makes very clear that penalty proceedings

recently recognized that it is not bound by penalty assess-
ment regulations adopted by the Secretary but rather that i
a proceeding before the Commission the amount of the penalt
to be assessed is a de novo determination based upon the si
statutory criteria specified in section 110(i) of the Act
and the information relevant thereto developed in the cours
of the adjudicative proceeding. Sellersburg Stone Company,
5 FMSHRC 287 (March 1983). Indeed, if this were not so, th
Commission would be nothing but a rubber stamp for the
Secretary.

The fact that MSHA may have determined that these viol
tions are not "significant and substantial" as that term pr
ently is defined by the Commission, is not determinative or
even relevant in these proceedings. I agree with Administr
tive Law Judge Broderick that whether a cited violation is
checked as significant and substantial is per se irrelevant
to the determination of the appropriate penalty to be asses
United States Steel Mining Co., Inc., 5 FMSHRC 934 (May 198
PDR granted June 22, 1983. Once this Commission's jurisdic
tion attaches we have our own statutory responsibilities to
fulfill and discharge. This can only be done on the basis
of an adequate record.

The Solicitor states with respect to all the violation
that exposure was minimal to none. I do not know what this
means and even if I did, one such bare conclusion most cer-
tainly would not satisfy the requirement that I assess a
penalty amount in accordance with the six statutory criteri

ORDER

In light of the foregoing, it is Ordered that the
Solicitor's motion for settlements be Denied.

It is further Ordered that within 30 days from the dat
of this order the Solicitor file information adequate for m
to determine whether the proposed penalties are justified
and settlements warranted. Otherwise, this case will be
assigned and set down for hearing on the merits.

ick Brown, R & S Coal Company, Inc., P. O. Box 468, Lamar,
R 72846 (Certified Mail)

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDI Docket No. CENT 82-10 A. C. No. 03-01384-03
v.	:	J & B No. 1 Mine
R & S COAL COMPANY, INC., Respondent	:	

PARTIAL APPROVAL/DISAPPROVAL OF SETTLEMENT
ORDER TO SUBMIT INFORMATION

The Solicitor has filed a motion to approve settleme with respect to the four citations involved in this matt The proposed settlements are for $20 apiece.

In my opinion, $20 is a nominal penalty which indic a lack of gravity. Citations Nos. 1025765 and 1024911 a record-keeping violations. They are, therefore, on thei face not serious, and I approve the proposed settlements $20 each for these violations. However, I will not issu order for the operator to pay these violations until add tional information is submitted with respect to the rema two violations.

Citation No. 1025764 involves an inadequate braking system on the front end loader. Citation No. 1025767 wa issued because the grader did not have an audible warnin device. The Solicitor represents that the negligence of respondent was low and that there were no employees on f in the area, thereby reducing the probability of occurre I accept these representations. Nevertheless, it appear that some degree of gravity may have been present and th therefore a $20 penalty for each of these violations wou be inappropriate.

In addition, the Solicitor states that the violatio were not considered significant and substantial.

This motion does not specifically mention section 1 of the regulations of the Mine Safety and Health Adminis 30 C.F.R. § 100.4, which provides for the assessment of $20 single penalty for a violation which MSHA believes i

on itself recently recognized that it is not bound
cy assessment regulations adopted by the Secretary
er that in a proceeding before the Commission the
f the penalty to be assessed is a de novo determina-
ed upon the six statutory criteria specified in
110(i) of the Act and the information relevant
developed in the course of the adjudicative pro-
Sellersburg Stone Company, 5 FMSHRC 287 (March
Indeed, if this were not so, the Commission would be
out a rubber stamp for the Secretary.

fact that MSHA may have determined that this viola-
not "significant and substantial" as that term pres-
defined by the Commission, is not determinative or
evant in these proceedings. I agree with Administra-
Judge Broderick that whether a cited violation is
as significant and substantial is per se irrelevant
etermination of the appropriate penalty to be assessed.
cates Steel Mining Co., Inc., 5 FMSHRC 934 (May
DR granted June 22, 1983.

ardless of the Secretary's regulations, once this
on's jurisdiction attaches we have our own statutory
oilities to fulfill and discharge. This can only be
the basis of an adequate record.

ORDER

light of the foregoing, it is Ordered that the
settlements for Citations No. 1025765 and No.
are hereby Approved.

is further Ordered that the proposed settlements for
s No. 1025764 and No. 1025767 are hereby Denied. It
er Ordered that within 30 days from the date of this
e Solicitor file information adequate for me to
e whether the proposed penalties are justified and
nts warranted for these two violations. Otherwise,
e will be assigned and set down for hearing on the

Paul Merlin

Rick Brown, R & S Coal Company, Inc., P. O. Box 468, Lamar, AR 72846 (Certified Mail)

July 18, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 83-10 A. C. No. 29-01153-03502
v.	:	San Juan Mine - Prep Plant
SAN JUAN COAL COMPANY, Respondent	:	

DENIAL OF SETTLEMENT
DENIAL OF DISMISSAL
ORDER TO SUBMIT INFORMATION

The Solicitor has filed a motion to dismiss this matter on the grounds that the operator has paid the proposed penalt in this case thereby making further action unwarranted. The fact that the operator has made payment is not dispositive of this matter and cannot preclude the Commission from acting in accordance with the governing statute.

Moreover, an examination of the file in this case indicates that more is involved than payment of the proposed pena by the operator. There is one violation involved in this cas and the proposed penalty is $20. The assessment sheet indicates that this was a "single penalty assessment" which was m pursuant to section 100.4 of the regulations of the Mine Safe and Health Administration, 30 C.F.R. § 100.4, which provides for the assessment of a $20 single penalty for a violation wh MSHA believes is not reasonably likely to result in a reasona serious injury or illness. The subject citation was issued b cause the operator did not take a valid respirable dust sampl during the August-September 1982 bi-monthly period from a des ignated work position as shown on an attached computer printo

In my opinion, $20 is a nominal penalty which indicates, among other things, a lack of gravity. I cannot say on the face of this violation alone that it is nonserious. Moreover I have been told nothing about any of the other statutory cri teria which would enable me to make an informed judgment as t a proper penalty assessment for this violation.

adjudicative proceeding. Sellersburg Stone Company, 5 F
287 (March 1983). Indeed, if this were not so, the Comm
would be nothing but a rubber stamp for the Secretary.

The fact that MSHA may have determined that this vi
lation is not "significant and substantial" as that term
presently is defined by the Commission, is not determina
or even relevant in these proceedings. I agree with Adm
istrative Law Judge Broderick that whether a cited viola
is checked as significant and substantial is per se irre
to the determination of the appropriate penalty to be as
United States Steel Mining Co., Inc., 5 FMSHRC 934 (May
PDR granted June 22, 1983.

Regardless of the Secretary's regulations, once thi
Commission's jurisdiction attaches we have our own statu
responsibilities to fulfill and discharge. This can onl
done on the basis of an adequate record. The Solicitor
finesse the matter by purporting to ignore the MSHA regu
in merely asking for dismissal because the operator has
the minimal penalty of $20.

ORDER

In light of the foregoing, it is Ordered that the
Solicitor's motion for dismissal be Denied.

It is further Ordered that within 30 days from the
of this order the Solicitor file information adequate fo
to determine the proper amount of a penalty. Otherwise,
case will be assigned and set down for hearing on the me

Paul Merlin
Chief Administrative Law J

Distribution:

Jack F. Ostrander, Esq., Office of the Solicitor, U. S.
ment of Labor, 555 Griffin Sq., Suite 501, Dallas, TX
(Certified Mail)

July 18, 1983

RETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
INE SAFETY AND HEALTH	:	
DMINISTRATION (MSHA),	:	Docket No. KENT 83-44
Petitioner	:	A. C. No. 15-12403-03504
	:	
v.	:	No. 2 Mine
	:	
AXIS COAL COMPANY, INC.,	:	
Respondent	:	

DENIAL OF SETTLEMENT
ORDER TO SUBMIT INFORMATION

The Solicitor has submitted a motion for settlement with pect to the five violations involved in this matter. The icitor's motion cannot be granted on the basis of the sent record.

Citations No. 2053271 and 2053272 each allege a violation 30 C.F.R. § 75.1719-1(d). These concern the failure of the rator to provide illumination in addition to the illumina- n provided by the cap lamp of the operator, on a shuttle . The Solicitor states in his motion that the Office of essments correctly evaluated the six criteria when it essed a penalty of $130 for each of these two violations. ever, the assessment sheet indicates that the proposed pen- y assessment for each of these violations was $91 reduced m $130 and the operator's check indicates that it paid $91 ece. Accordingly, I cannot approve the proposed settlements these violations because the Solicitor's motion is based n one amount whereas MSHA has accepted payment of a lesser ure.

The proposed settlements for the remaining three viola- ns are for $20 each. The Solicitor states only that he ieves that the Assessment Office correctly determined that single penalty assessment" was appropriate and that the pector did not indicate that the respondent was negligent, gravity contemplated, or the number of persons affected. proposed settlements for these three violations is there- e predicated solely upon section 100.4 of the regulations the Mine Safety and Health Administration, 30 C.F.R. 100.4. s regulation provides for the assessment of a $20 single

it is not even relevant. Moreover, the fact that the opera has tendered payment cannot preclude the Commission from ac ing in accordance with the governing statute. In my opinic $20 is a nominal penalty which indicates a lack of gravity. As already indicated, the Solicitor has told me nothing abc gravity, negligence, or any other factors which would enabl me to make an informed judgment as to proper penalty amount for these three citations.

The Act makes very clear that penalty proceedings befc the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty assessment regul tions adopted by the Secretary but rather that in a proceed ing before the Commission the amount of the penalty to be assessed is a de novo determination based upon the six stat tory criteria specified in section 110(i) of the Act and th information relevant thereto developed in the course of the adjudicative proceeding. Sellersburg Stone Company, 5 FMSH 287 (March 1983). Indeed, if this were not so, the Commiss would be nothing but a rubber stamp for the Secretary.

The fact that MSHA may have determined that this viola tion is not "significant and substantial" as that term pres ently is defined by the Commission, is not determinative or even relevant in these proceedings. I agree with Administr tive Law Judge Broderick that whether a cited violation is checked as significant and substantial is per se irrelevant to the determination of the appropriate penalty to be asses United States Steel Mining Co., Inc., 5 FMSHRC 934 (May 198 PDR granted June 22, 1983.

Regardless of the Secretary's regulations, once this Commission's jurisdiction attaches we have our own statutor responsibilities to fulfill and discharge. This can only b done on the basis of an adequate record.

ORDER

In light of the foregoing, it is Ordered that the Solicitor's motion for settlements be Denied.

It is further Ordered that within 30 days from the dat of this order the Solicitor file information adequate for m to determine whether the proposed penalties are justified

Sheridan Booth, Superintendent, Abraxis Coal Co., Inc.,
General Delivery, Inez, KY 41224 (Certified Mail)

	:	
v.	:	Mercer Lime & Stone
	:	
MERCER LIME & STONE COMPANY, Respondent	:	

PARTIAL APPROVAL AND PARTIAL DISAPPROVAL OF SETTLE
ORDER TO SUBMIT INFORMATION

The Solicitor has filed a motion to approve settle for the two violations involved in this matter.

The Solicitor submits a proposed settlement in the of $48 for Citation No. 2007509 which was issued for a tion of 30 C.F.R. 56.9-22. The inspector observed that was not provided for the outer bank of the elevated roa around the No. 1 and No. 2 ponds. The Solicitor advise the operator demonstrated good faith efforts to abate t condition by constructing a berm for the outer bank of elevated roadway around both ponds well within the time fied for abatement. The proposed settlement is not lar in view of the Solicitor's advice that the operator is and that it has a very small history of prior violation will approve the recommended settlement for this item.

With respect to the second item which was issued f violation of 30 C.F.R. 56.11-1 when the inspector obser a safe means of access was not provided at the dust scr under the cyclones, the Solicitor recommends a $20 pena This proposed settlement is predicated solely upon sect 100.4 of the regulations of the Mine Safety and Health istration, 30 C.F.R. 100.4 which provides for the asses of a $20 single penalty for a violation which is not re likely to result in a reasonably serious injury or illn

I am unable to approve the proposed $20 settlement my opinion, $20 is a nominal penalty which indicates a of gravity. A reading of the citation indicates that g may well have been present. In any event, I have been nothing about gravity or negligence so as to enable me make an informed judgment with respect to the proper pe amount for this citation.

The MSHA regulation in question is not binding upon the Commission. Indeed, it is not even relevant. The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty assessment regulations adopted by the Secretary but rather that in a proceeding before the Commissi the amount of the penalty to be assessed is a de novo determination based upon the six statutory criteria specified in section 110(i) of the Act and the information relevant theret developed in the course of the adjudicative proceeding. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983). Indeed if this were not so, the Commission would be nothing but a rubber stamp for the Secretary.

The fact that MSHA may have determined that this violation is not "significant and substantial" as that term presently is defined by the Commission, is not determinative or even relevant in these proceedings. I agree with Administrat Law Judge Broderick that whether a cited violation is checked as significant and substantial is per se irrelevant to the determination of the appropriate penalty to be assessed. United States Steel Mining Co., Inc., 5 FMSHRC 934 (May 1983) PDR granted June 22, 1983.

Regardless of the Secretary's regulations, once this Commission's jurisdiction attaches we have our own statutory responsibilities to fulfill and discharge. This can only be done on the basis of an adequate record.

ORDER

In light of the foregoing, it is Ordered that the Solicitor's motion for settlement with respect to Citation 2007509 be approved. I will not issue an order directing the operator to pay $48 for this citation until information is submitted with respect to the other citation as set forth immediately hereafter.

It is further Ordered that within 30 days from the date of this order the Solicitor file information adequate for me to determine whether the proposed penalty in settlement is warranted for Citation No. 2007508. If the Solicitor does not do so, this case will be assigned and set down for hearin

James Christy, Foreman, Mercer Lime & Stone Co., P. O. Box
Branchton, PA 16021 (Certified Mail)

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDIN Docket No. PENN 83-90 A. C. No. 36-04999-0350
v.	:	Leslie Tipple Mine
POWER OPERATING COMPANY, INC., Respondent	:	

DENIAL OF SETTLEMENT
ORDER TO SUBMIT INFORMATION

The Solicitor has filed a motion for a decision and order approving settlement in the amount of $20 for the on violation involved in this matter. The motion is predicat solely upon section 100.4 of the regulations of the Mine Safety and Health Administration, 30 C.F.R. § 100.4, which provides for the assessment of a $20 single penalty for a violation which MSHA believes is not reasonably likely to result in a reasonably serious injury or illness. The violation was issued because a suitable backguard was not provided for the vertical ladder that extended to the feed platform approximately 9 feet from ground level.

I am unable to approve the motion for settlement on t basis of the present record. In my opinion, $20 is a nomi penalty which indicates a lack of gravity. I note that th inspector has checked Item 21 on the citation form to indi that the occurrence of the event against which the cited standard directed was unlikely. I also note that he has checked Item 20 to indicate that negligence was low. Howe I have been told nothing about the circumstances which led the inspector to reach these conclusions, nor have I been given any information about the other statutory factors which would enable me to make an informed judgment as to the proper penalty amount.

The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty assess ment regulations adopted by the Secretary but rather that a proceeding before the Commission the amount of the penal to be assessed is a de novo determination based upon the s

The fact that MSHA may have ... tion is not "significant and substantial" as that term presently is defined by the Commission, is not determinative or even relevant in these proceedings. I agree with Administrative Law Judge Broderick that whether a cited violation is checked as significant and substantial is per se irrelevant to the determination of the appropriate penalty to be assess United States Steel Mining Co., Inc., 5 FMSHRC 934 (May 1983 PDR granted June 22, 1983.

The MSHA regulation in question is not binding upon the Commission. Indeed, it is not even relevant. Moreover, the fact that the operator has tendered payment cannot preclude the Commission from acting in accordance with the governing statute.

Regardless of the Secretary's regulations, once this Commission's jurisdiction attaches we have our own statutory responsibilities to fulfill and discharge. This can only be done on the basis of an adequate record.

ORDER

In light of the foregoing, it is Ordered that the Solicitor's motion for settlement be Denied.

It is further Ordered that within 30 days from the date of this order the Solicitor file information adequate for me to determine whether the proposed penalty is justified and settlement warranted. Otherwise, this case will be assigned and set down for hearing on the merits.

Paul Merlin
Chief Administrative Law Judge

Distribution:

William M. Connor, Esq., Office of the Solicitor, U. S. Department of Labor, Rm. 14480-Gateway Bldg., 3535 Market St., Philadelphia, PA 19104 (Certified Mail)

Petitioner	:	A. C. No. 44-05340-03508
	:	
v.	:	No. 1 Mine
	:	
D. L. & P. COAL CO., INC., Respondent	:	

DENIAL OF MOTION TO WITHDRAW PETITION
DENIAL OF SETTLEMENT
ORDER TO SUBMIT INFORMATION

The Secretary has moved to withdraw his petition for the assessment of civil penalties for the 11 citations involved in this matter. The Solicitor states that the operator has paid $20 each for the 11 proposed penalties or a total of $220. The Solicitor further states that the citations did not cause an imminent danger nor did they significantly and substantially contribute to a coal mine safety or health hazard. He stated that these violations were not reasonably likely to result in a reasonably serious injury or illness and were abated within the time set by the inspector and that in addition the employer demonstrated good faith in abating these violations and has a relatively good history of complying with the requirements of the Act.

The 11 violations were issued for a variety of condition including ventilation and dust violations, inadequate temporary splices, lack of guarding, improperly installed fire outlets on a water line, permissibility violations, and improperly located battery-charging stations. In my opinion $20 is a nominal penalty which indicates a lack of gravity. With respect to these 11 violations, I have been told nothing about gravity, negligence, or any of the other statutory factors sufficient to enable me to make an informed judgment as to proper penalty amounts.

The assessment sheet indicates that the $20 penalties in this matter are the so-called "single penalty assessments made pursuant to section 100.4 of the regulations of the Mine Safety and Health Administration, 30 C.F.R. § 100.4, which provides for the assessment of a $20 single penalty for a violation which MSHA believes is not reasonably likely to result in a reasonably serious injury or illness.

the Commission from acting in accordance with the governi statute.

The Act makes very clear that penalty proceedings be the Commission are de novo. The Commission itself recent recognized that it is not bound by penalty assessment reg tions adopted by the Secretary but rather that in a proce before the Commission the amount of the penalty to be ass is a de novo determination based upon the six statutory c teria specified in section 110(i) of the Act and the info relevant thereto developed in the course of the adjudicat proceeding. Sellersburg Stone Company, 5 FMSHRC 287 (Mar 1983). Indeed, if this were not so, the Commission would nothing but a rubber stamp for the Secretary.

The fact that MSHA may have determined that this vio is not "significant and substantial" as that term present is defined by the Commission, is not determinative or eve relevant in these proceedings. I agree with Administrati Law Judge Broderick that whether a cited violation is che as significant and substantial is per se irrelevant to th determination of the appropriate penalty to be assessed. United States Steel Mining Co., Inc., 5 FMSHRC 934 (May 1 PDR granted June 22, 1983.

Regardless of the Secretary's regulations, once this Commission's jurisdiction attaches we have our own statut responsibilities to fulfill and discharge. This can only done on the basis of an adequate record.

ORDER

In light of the foregoing, it is Ordered that the Solicitor's motion to withdraw be Denied.

It is further Ordered that within 30 days from the d of this order the Solicitor file information adequate for to determine appropriate penalty amounts for the 11 citat Otherwise, this case will be assigned and set down for he ing on the merits.

Paul Merlin

Ronnie Lester, D. L. & P. Coal Company, P. O. Box 143, Birchleaf, VA 24220 (Certified Mail)

Petitioner	:	A. C. No. 46-03795-03
	:	
v.	:	No. 14 Mine
	:	
ENERGY COAL CORPORATION,	:	
Respondent	:	

DENIAL OF SETTLEMENT
ORDER TO SUBMIT INFORMATION

The Solicitor has filed a motion for a settlement approval for the two citations involved in this matter. original assessments totaled $148 and the proposed settle ments are for $20 apiece.

This motion is predicated solely upon section 100.4 the regulations of the Mine Safety and Health Administrat 30 C.F.R. 100.4, which provides for the assessment of a $ single penalty for a violation which MSHA believes is not reasonably likely to result in a reasonably serious injur or illness. The Solicitor attaches to his motion copies modifications to the subject citations deleting the "sign cant and substantial" description. On this basis he seek approval of the so-called "single penalty assessment".

The first violation was issued for accumulation of c bustible materials, creating fire hazards. The second ci tion was issued for an unguarded drive chain and sprocket on a wall drill. The inspector indicated that negligence both cases was moderate and that occurrence was reasonabl likely. I am unable to approve the motion for settlement on the basis of the present record. In my opinion, $20 i nominal penalty which indicates a lack of gravity. From face of the two citations, and based upon the inspector's statements, it appears that the violations were serious a that the operator was negligent. Under such circumstanc a nominal penalty would not be warranted. See Orders Re ing Proposed Settlement issued by Administrative Law Judg George A. Koutras in Glen Irvan Corporation, PENN 82-23 (April 4, 1983) and PENN 82-25 (April 6, 1983).

The MSHA "single penalty assessment" regulation is n binding upon the Commission. Indeed, it is not even rele Certainly the fact that the operator has agreed to tende

nce with the governing statute.

The Act makes very clear that penalty proceedings before he Commission are de novo. The Commission itself recently ecognized that it is not bound by penalty assessment regula- ions adopted by the Secretary but rather that in a proceeding efore the Commission the amount of the penalty to be assessed s a de novo determination based upon the six statutory cri- eria specified in section 110(i) of the Act and the informa- ion relevant thereto developed in the course of the adjudica- ive proceeding. Sellersburg Stone Company, 5 FMSHRC 287 March 1983). Indeed, if this were not so, the Commission ould be nothing but a rubber stamp for the Secretary.

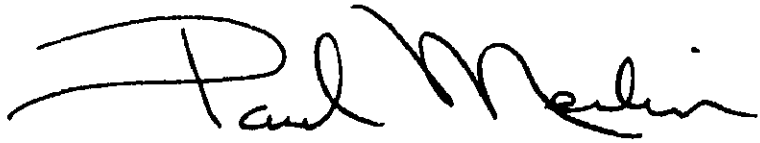
The fact that MSHA may have determined that this viola- ion is not "significant and substantial" as that term pres- ntly is defined by the Commission, is not determinative or ven relevant in these proceedings. I agree with Administra- ive Law Judge Broderick that whether a cited violation is hecked as significant and substantial is per se irrelevant o the determination of the appropriate penalty to be assessed. nited States Steel Mining Co., Inc., 5 FMSHRC 934 (May 1983), OR granted June 22, 1983.

Regardless of the Secretary's regulations, once this ommission's jurisdiction attaches we have our own statutory esponsibilities to fulfill and discharge. This can only be one on the basis of an adequate record.

ORDER

In light of the foregoing, it is Ordered that the olicitor's motion for settlements be Denied.

It is further Ordered that within 30 days from the date f this order the Solicitor file information adequate for me o determine whether the proposed penalties are justified nd settlements warranted. Otherwise, this case will be ssigned and set down for hearing on the merits.



Paul Merlin

Donald McConnell, Director of Safety and Training, Energy Co
Corporation, P. O. Box 72, Paintsville, KY 41240 (Certified
Mail)

ADMINISTRATION (MSHA),	:	Docket No. CENT 82-107
Petitioner	:	A.C. No. 03-01384-03020
v.	:	
	:	J & B No. 1 Mine
R & S COAL COMPANY, INC.,	:	
Respondent	:	

PARTIAL APPROVAL AND PARTIAL DISAPPROVAL OF SETTLEMENT

ORDER TO SUBMIT INFORMATION

The Solicitor has filed a motion to approve settlement for the two violations involved in this matter. The origin assessments for the violations totaled $56. The proposed settlement totals $40.

Citation No. 1025373 was issued for failure to provide potable drinking water. I find this a nonserious violation on its face. The Solicitor advises that the operator exhibited a low degree of negligence. The Solicitor propos a penalty of $20. Accordingly, I accept the proposed settl ment.

Citation No. 1025375 was issued for failure to keep walkways free of extraneous materials. The Solicitor advises that negligence was low and proposes a reduction in penalty from $28 to $20. In my opinion, $20 denotes a lack of gravity. In this instance, the citation states that a stumbling and slipping hazard existed. This violation appears serious on the face of the citation. Therefore, although I have not overlooked the operator's small size and small history, I cannot approve the proposed settlement on the basis of the information submitted to date.

The Solicitor also advises that this citation was not "significant and substantial." It appears that the proposa to settle the citation for $20 was done as the result of th so-called "single penalty assessment" which is set forth in section 100.4 of the regulations of the Mine Safety and Health Administration, 30 C.F.R. § 100.4 which provides for

believes is not reasonably likely to result in a reaso
serious injury or illness. This regulation is not bin
upon the Commission and is not a basis upon which I co
approve a settlement.

The Act makes very clear that penalty proceedings
before the Commission are de novo. The Commission its
recently recognized that it is not bound by penalty as
ment regulations adopted by the Secretary but rather t
a proceeding before the Commission the amount of the p
to be assessed is a de novo determination based upon t
statutory criteria specified in section 110(i) of the
and the information relevant thereto developed in the
of the adjudicative proceeding. Sellersburg Stone Com
5 FMSHRC 287 (March 1983). Indeed, if this were not s
Commission would be nothing but a rubber stamp for the
Secretary.

The fact that MSHA may have determined that this
violation is not "significant and substantial" as that
presently is defined by the Commission, is not determi
or even relevant in this proceeding. I agree with Adm
istrative Law Judge Broderick that whether a cited vio
is checked as significant and substantial is per se ir
to the determination of the appropriate penalty to be
assessed. United States Steel Mining Co., Inc., 5 FMS
934 (May 1983), PDR granted June 22, 1983.

Regardless of the Secretary's regulations, once t
Commission's jurisdiction attaches we have our own sta
responsibilities to fulfill and discharge. This can o
done on the basis of an adequate record.

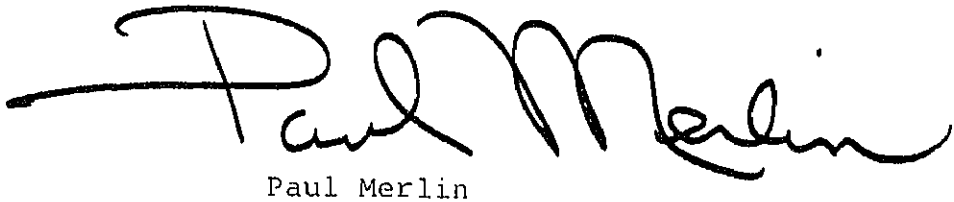
I will not order payment of the settlement amount
Citation No. 1025373 pending final disposition of Cita
No. 1025375.

ORDER

In light of the foregoing, it is Ordered that the
Solicitor's motion for settlement be Denied.

It is further Ordered that within 30 days from th
of this order the Solicitor file information adequate

to determine whether the proposed penalty for Citation No. 1025375 is justified and settlement warranted. Otherwise, this case will be assigned and set down for hearing on the merits.



Paul Merlin
Chief Administrative Law Judge

Distribution:

Jack F. Ostrander, Esq., Office of the Solicitor, U. S. Department of Labor, 555 Griffin Square Building, Dallas, TX 75202 (Certified Mail)

Mr. Rick Brown, R & S Coal Company, Inc., P. O. Box 468, Lamar, AR 72846 (Certified Mail)

v.	:	Arlen No. 1 Mine
BLACK BEAUTY COAL COMPANY, INC., Respondent	:	

DENIAL OF MOTION TO WITHDRAW PROPOSAL FOR PENALT
ORDER TO SUBMIT INFORMATION

The Solicitor has filed a motion to withdraw his p for civil penalties for the 8 violations involved in th matter. As grounds for this motion, the Solicitor reci that he has received a check from the operator in the a of $160 in full payment for the 8 penalties. The Solic further states that the operator has represented that i sires to withdraw its contest of the proposed penalties that the full payment of these penalties is a satisfact appropriate resolution of this controversy. The citati were issued for a variety of conditions, including lack audible warning devices, lack of seat belts, and inoper parking brakes on various types of equipment.

The Solicitor does not refer to any MSHA regulatio support of his motion but rather relies upon the operat payment, its wish to withdraw its contest, and the alle that the payment already made is a satisfactory and app ate resolution of this matter. It appears from the ass sheet that all of these violations were so-called "sing penalty assessments". Such assessments are made pursua section 100.4 of the regulations of the Mine Safety and Administration, 30 C.F.R. § 100.4, which provides for t assessment of a $20 single penalty for a violation whic believes is not reasonably likely to result in a reason serious injury or illness.

I am unable to approve the motion to withdraw on t basis of the present record. In my opinion, $20 is a n penalty which indicates, among other things, a lack of I have been told nothing about gravity, negligence, or the other statutory factors which would enable me to ma informed judgment as to proper penalty amounts for thes tions. Certainly, each citation on its face does not i a lack of gravity.

Commission. Indeed, it is not even relevant. Moreover, the fact that the operator has tendered payment cannot preclude the Commission from acting in accordance with the governing statute.

The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty assessment regulations adopted by the Secretary but rather that in a proceeding before the Commission the amount of the penalty to be assessed is a de novo determination based upon the six statutory criteria specified in section 110(i) of the Act and the information relevant thereto developed in the course of the adjudicative proceeding. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983). Indeed, if this were not so, the Commission would be nothing but a rubber stamp for the Secretary.

The fact that MSHA may have determined that this violation is not "significant and substantial" as that term presently is defined by the Commission, is not determinative or even relevant in these proceedings. I agree with Administrative Law Judge Broderick that whether a cited violation is checked as significant and substantial is per se irrelevant to the determination of the appropriate penalty to be assessed. United States Steel Mining Co., Inc., 5 FMSHRC 934 (May 1983), PDR granted June 22, 1983.

Regardless of the Secretary's regulations, once this Commission's jurisdiction attaches we have our own statutory responsibilities to fulfill and discharge. This can only be done on the basis of an adequate record.

ORDER

In light of the foregoing, it is Ordered that the Solicitor's motion to withdraw be Denied.

It is further Ordered that within 30 days from the date of this order the Solicitor file information adequate for me to determine whether the proposed penalties are justified and settlements warranted. Otherwise, this case will be assigned and set down for hearing on the merits.

T. C. Chambers, Safety Director, Black Beauty Coal Co., Inc., R.R. #1, Box 133, Plainville, IN 47568 (Certified Mail)

	:	
v.	:	Crescent Mine
	:	
ENT HILLS COAL COMPANY,	:	
.,	:	
Respondent	:	

DENIAL OF SETTLEMENT
ORDER TO SUBMIT INFORMATION

The Solicitor has filed a motion to approve settlements he 12 violations involved in this case. Based upon the nt record, I am unable to approve the motion.

Nine of the violations carry proposed penalty settlements ng from $74 to $158. The Solicitor does not discuss violations individually. Rather in a summary paragraph ates that all of them were serious, that the operator's gence ranged from ordinary to moderately high, and that ere abated within the time set by the inspectors. I been given no information about the operator's size, history and ability to continue in business. The sed settlements may be appropriate but since I do not complete information, I cannot act in accordance with tatutory criteria set forth in section 110(i) of the I recognize that the proposed settlements are for the nally assessed amounts but this is not determinative. olicitor must furnish the required information.

The Solicitor proposes settlements for the remaining violations in the amounts of $20 apiece. These proposed ements are predicated solely upon section 100.4 of the ations of the Mine Safety and Health Administration, 30 . 100.4 which provides for the assessment of a $20 single ty for a violation which is not reasonably likely to re- in a reasonably serious injury or illness.

I am unable to approve the motion for the $20 settlements. opinion, $20 is a nominal penalty which indicates a lack avity. With respect to these three violations, I have told nothing about gravity, negligence, or any other fac- which would enable me to make an informed judgment as oper penalty amounts for these items. The MSHA regulation estion is not binding upon the Commission. Indeed, it

has tendered payment cannot preclude the Commission from acting in accordance with the governing statute.

The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty assessment regulations adopted by the Secretary but rather that in proceeding before the Commission the amount of the penalty assessed is a de novo determination based upon the six statutory criteria specified in section 110(i) of the Act and information relevant thereto developed in the course of the adjudicative proceeding. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983). Indeed, if this were not so, the Commission would be nothing but a rubber stamp for the Secretary.

The fact that MSHA may have determined that this violation is not "significant and substantial" as that term presently is defined by the Commission, is not determinative or even relevant in these proceedings. I agree with Administrative Law Judge Broderick that whether a cited violation is checked as significant and substantial is per se irrelevant to the determination of the appropriate penalty to be assessed. United States Steel Mining Co., Inc., 5 FMSHRC 934 (May 1983) PDR granted June 22, 1983. Regardless of the Secretary's regulations, once this Commission's jurisdiction attaches we have our own statutory responsibilities to fulfill and discharge. This can only be done on the basis of an adequate record.

ORDER

In light of the foregoing, it is Ordered that the Solicitor's motion for settlements be Denied.

It is further Ordered that within 30 days from the date of this order the Solicitor file information adequate for me to determine whether the proposed penalties are justified and settlements warranted. Otherwise, this case will be assigned and set down for hearing on the merits.

Paul Merlin

Melvin E. Poluchette, Vice President, Crescent Hills Coal Company, Inc., 408 Millcraft Center, Washington, PA 15301 (Certified Mail)

July 19, 1983

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 83-67
Petitioner	:	A.C. No. 36-02713-03501
v.	:	
	:	Frenchtown Strip Mine
ANSCO, INCORPORATED,	:	
Respondent	:	

PARTIAL DENIAL OF SETTLEMENT

ORDER TO SUBMIT INFORMATION

The Solicitor has filed a motion to approve settlements the three violations involved in this matter. The proposed settlements are for the originally assessed amounts. Two vio were assessed at $20 apiece and one violation was assessed at

While the motion for settlement contains sufficient info tion to approve settlement of the $98 violation, there is lit information regarding the two $20 violations. In my opinion, denotes a lack of gravity. However, the $20 violations are f lack of insulated bushings and proper fittings for power wire a generator and lack of non-conductive material at a circuit The inspector has checked boxes on the citations which indica that negligence was low and an accident was unlikely to occur each case. I cannot approve a settlement on the basis of che in boxes because no reasons are given for the bare conclusion represented by the checks.

The Solicitor advises that the two violations which are assessed at $20 each were done so as the result of the so-cal "single penalty assessment" which is set forth in section 100 of the regulations of the Mine Safety and Health Administrati 30 C.F.R. § 100.4 which provides for the assessment of a $20 penalty for a violation MSHA believes is not reasonably likel result in a reasonably serious injury or illness. This regul is not binding upon the Commission and is not a basis upon wh could approve a settlement.

The Act makes very clear that penalty proceedings before Commission are de novo. The Commission itself recently recog

rse of the adjudicative proceeding. Sellersburg Stone Company, MSHRC 287 (March 1983). Indeed, if this were not so, the mission would be nothing but a rubber stamp for the Secretary.

The fact that MSHA may have determined that these violations not "significant and substantial" as that term presently is ined by the Commission, is not determinative or even relevant this proceeding. I agree with Administrative Law Judge Broderic t whether a cited violation is checked as significant and sub- ntial is per se irrelevant to the determination of the appro- ate penalty to be assessed. United States Steel Mining Co., Inc MSHRC 934 (May 1983), PDR granted June 22, 1983.

Regardless of the Secretary's regulations, once this mission's jurisdiction attaches we have our own statutory ponsibilities to fulfill and discharge. This can only be done the basis of an adequate record.

I approve of the settlement of the $98 violation but will direct payment until information is furnished for the two violations.

ORDER

In light of the foregoing, it is Ordered that the Solicitor's ion for settlement be Denied.

It is further Ordered that within 30 days from the date of s order the Solicitor file information adequate for me to ermine whether the proposed $20 penalties for the two citations cussed above are justified and settlement warranted. Otherwise, s case will be assigned and set down for hearing on the merits.

Paul Merlin
Chief Administrative Law Judge

tribution:

liam M. Connor, Esq., Office of the Solicitor, U.S. Department Labor, Room 14480 Gateway Building, 3535 Market Street, ladelphia, PA 19104 (Certified Mail)

co, Incorporated, P.O. Box 4371, 901 Neubling Ave.,

v. :
: No. 4 Surface Mine
DEAN COAL COMPANY, :
Respondent :

DENIAL OF SETTLEMENT

ORDER TO SUBMIT INFORMATION

In accordance with what now is apparently becoming
practice, the Solicitor has filed a motion for settlemen
amount of $20 for the one violation involved in this mat
motion is predicated solely upon section 100.4 of the re
of the Mine Safety and Health Administration, 30 C.F.R.
which provides for the assessment of a $20 penalty for a
which is not reasonably likely to result in a reasonably
injury or illness. In my opinion, $20 indicates a lack
The citation was issued for the use of a refuse truck wi
inoperative automatic reverse warning device. I cannot
violation appears to be nonserious on the face of the ci
In any event, I have been told nothing by the Solicitor
gravity or negligence or any other of the statutory fact
would enable me to make an informed judgment as to the p
penalty for this violation.

I am unable to grant the Solicitor's motion on the
the present record. The Act makes very clear that penal
ings before the Commission are de novo. The Commission
recently recognized that it is not bound by penalty asse
regulations adopted by the Secretary but rather that in
ing before the Commission the amount of the penalty to b
is a de novo determination based upon the six statutory
specified in section 110(i) of the Act and the informati
thereto developed in the course of the adjudicative proc
Sellersburg Stone Company, 5 FMSHRC 287 (March 1983). I
this were not so, the Commission would be nothing but a
for the Secretary.

The fact that MSHA may have determined that this vi
is not "significant and substantial" as that term presen
defined by the Commission, is not determinative or even

his proceeding. I agree with Administrative Law Judge Broderick whether a cited violation is checked as significant and sub- ial is per se irrelevant to the determination of the appro- e penalty to be assessed. United States Steel Mining Co., Inc., HRC 934 (May 1983), PDR granted June 22, 1983.

Regardless of the Secretary's regulations, once this ssion's jurisdiction attaches we have our own statutory nsibilities to fulfill and discharge. This can only be done he basis of an adequate record.

ORDER

In light of the foregoing, it is Ordered that the Solicitor's n for settlement be Denied.

It is further Ordered that within 30 days from the date of order the Solicitor file information adequate for me to rmine whether the proposed penalty is justified and settlement nted. Otherwise, this case will be assigned and set down for ng on the merits.

Paul Merlin
Chief Administrative Law Judge

ribution:

e M. Fernandez, Esq., Office of the Solicitor, U.S. Department bor, 280 U.S. Courthouse, 801 Broadway, Nashville, TN 37203 tified Mail)

Ralph M. Ross, President, Dean Coal Company, 4912 Westover ace S.E., Knoxville, TN 37914 (Certified Mail)

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. VA 83-18
	:	A.C. No. 44-00294-03516
v.	:	
	:	No. 1 Mine
EASTOVER MINING COMPANY, Respondent	:	

DENIAL OF SETTLEMENT

ORDER TO SUBMIT INFORMATION

The Solicitor has submitted a motion to withdraw his petition for the assessment of civil penalty on the ground that the operator has agreed to payment of the proposed penalties in full. The motion must be denied.

This case involves three citations.

The first item is a Section 104(d) order, 00930034, which was subsequently modified to a Section 104(a) citation. According to the Solicitor after MSHA review it was determined that the violation involved no reasonable likelihood of a reasonably serious injury occurring. On this basis the Solicitor proposes a "single penalty assessment" of $20. This penalty amount apparently is predicated upon section 100.4 of the regulations of the Mine Safety and Health Administration, 30 C.F.R. § 100.4 which provides for the assessment of a $20 single penalty for a violation which MSHA believes is not reasonably likely to result in a reasonably serious injury or illness.

In my opinion, $20 is a nominal penalty which indicates a lack of gravity. It may be that this violation was non-serious, but I have been told nothing by the Solicitor about gravity or negligence or any of the other statutory factors which would enable me to make an informed judgment as to a proper penalty for this violation. The violation which was cited for a failure to lock out and tag a disconnecting device was said by the inspector in a modification to involve no negligence or gravity, but the inspector gave no

The MSHA regulation in question is not binding upon the Commission. Indeed, it is not even relevant. The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty assessment regulations adopted by the Secretary but rather that in a proceeding before the Commission the amount of the penalty to be assessed is a de novo determination based upon the six statutory criteria specified in section 110(i) of the Act and the information relevant thereto developed in the course of the adjudicative proceeding. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983). Indeed, if this were not so, the Commission would be nothing but a rubber stamp for the Secretary.

The fact that MSHA may have determined that this violation is not "significant and substantial" as that term presently is defined by the Commission, is not determinative or even relevant in these proceedings. I agree with Administrative Law Judge Broderick that whether a cited violation is checked as significant and substantial is per se irrelevan to the determination of the appropriate penalty to be assesse United States Steel Mining Co., Inc., 5 FMSHRC 934 (May 1983), PDR granted June 22, 1983. Regardless of the Secretary's regulations, once this Commission's jurisdiction attaches we have our own statutory responsibilities to fulfill and discharge. This can only be done on the basis of an adequate record.

The Solicitor further advises that a penalty of $136 has been proposed by MSHA for the next item which was a 104(d) order, 00932049, involving a roof violation under 30 C.F.R. § 75.200. The Solicitor, however, gives no discussion of the subject condition and, as already pointed out, this is a de novo proceeding in which the original assessment amount is not in any way determinative. The inspector said in a modification that negligence was high and occurrence of the event reasonably likely. The inspector gave no reasons, but even his bare conclusions cast some doubt upon a $136 penalty.

The same is true of the third item which is a section 104(d)(2) order, 00931995, alleging a violation of 30 C.F.R. § 75.1725. For this item the Solicitor advises that MSHA has proposed a penalty of $275. However, beyond stating the bare conclusion that the operator exhibited a high

and substantial, the Solicitor gives no basis for approval of this amount. I cannot accept bare conclusions which have no supporting rationale.

ORDER

In light of the foregoing, it is Ordered that the Solicitor's motion to withdraw be Denied.

It is further Ordered that within 30 days from the date of this order the Solicitor file information adequate for me to determine whether the proposed penalties are justified an settlements warranted. Otherwise, this case will be assigne and set down for hearing on the merits.

Paul Merlin
Chief Administrative Law Judge

Distribution:

Leo J. McGinn, Esq., Office of the Solicitor, U. S. Departme of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

Eastover Mining Company, General Delivery, Brookside, KY 40801 (Certified Mail)

ADMINISTRATION (MSHA),	:	Docket No. WEST 82-208-M
Petitioner	:	A.C. No. 02-00151-05501
v.	:	
	:	San Manuel Mine
MAGMA COPPER COMPANY,	:	
Respondent	:	

DENIAL OF MOTION TO WITHDRAW

ORDER TO SUBMIT INFORMATION

The Solicitor has filed a motion to withdraw based on full payment of the original assessment of the one violatio involved in this matter. The citation was assessed at $20.

The Solicitor, however, has given me no basis to approve the proposed settlement. There is no analysis of why $20 is an appropriate penalty for the violation. The Solicitor merely states that the operator has paid the originally assessed amount and has filed for a modification of the cited standard. The citation is for failure to properly bush insulated wires extending out of three junction boxes. I cannot find a lack of gravity on the face of the subject citation. I have not overlooked the statements in the motion to withdraw that the only issue presented is whether a strain relief clamp is the equivalen of the bushing requirement in the standard and that the operator has filed a petition for modification on this question. However, I have not been specifically told whether a clamp was used here and if it was, whether such use rendered the violation nonserious.

It appears from the assessment sheet that the one violation which was assessed at $20 was done so as the result of the so-called "single penalty assessment" which is set forth in section 100.4 of the regulations of the Mine Safety and Health Administration, 30 C.F.R. § 100.4 which provides for the assessment of a $20 single penalty for a violation MSHA believes is not reasonably likely to result in a reasonably serious injury or illness. This regulation is not binding upon the Commission and is not a basis upon which I could approve a settlement.

The Act makes very clear that penalty proceedings before t Commission are de novo. The Commission itself recently recogni that it is not bound by penalty assessment regulations adopted the Secretary but rather that in a proceeding before the Commis the amount of the penalty to be assessed is a de novo determina based upon the six statutory criteria specified in section 110(of the Act and the information relevant thereto developed in th course of the adjudicative proceeding. Sellersburg Stone Compa 5 FMSHRC 287 (March 1983). Indeed, if this were not so, the Commission would be nothing but a rubber stamp for the Secretar

The fact that MSHA may have determined that this violation not "significant and substantial" as that term presently is def by the Commission, is not determinative or even relevant in thi proceeding. I agree with Administrative Law Judge Broderick th whether a cited violation is checked as significant and substan is per se irrelevant to the determination of the appropriate pe to be assessed. United States Steel Mining Co., Inc., 5 FMSHRC (May 1983), PDR granted June 22, 1983.

Regardless of the Secretary's regulations, once this Commission's jurisdiction attaches we have our own statutory responsibilities to fulfill and discharge. This can only be do on the basis of an adequate record.

ORDER

In light of the foregoing, it is Ordered that the Solicito motion be Denied.

It is further Ordered that within 30 days from the date of this order the Solicitor file information adequate for me to determine whether the proposed penalty is justified and withdra based upon an appropriate payment warranted. Otherwise, this c will be assigned and set down for hearing on the merits.

Paul Merlin
Chief Administrative Law Judge

Distribution:

Theresa Fay Bustillos, Esq., Office of the Solicitor, U.S. Department of Labor, 11071 Federal Building, 450 Golden Gate

July 19, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 83-30-M
	:	A.C. No. 48-00715-05501
v.	:	
	:	Casper Gravel Pit
CASPER CONCRETE COMPANY, Respondent	:	

DENIAL OF SETTLEMENT

ORDER TO SUBMIT INFORMATION

The parties have filed a motion to approve settlements for the seven violations involved in this matter. The proposed settlements are for the originally assessed amounts. Six violations were assessed at $20 apiece and one violation was assessed at $98.

The motion for settlement approval contains no discussion whatsoever regarding any of the alleged violations. Rather the motion merely states that the Secretary agrees with and relies upon MSHA's evaluation of the statutory criteria and concludes:

> WHEREFORE, the parties pray that the proposed penalties be approved, respondent be granted leave to withdraw its contest to the penalties as proposed by the agency, and an order be entered requiring respondent to pay the proposed penalties within forty days of the filing of an order approving the penalties.

Although the Secretary may be willing to rely upon MSHA's evaluation of the statutory criteria, this Commission most certainly cannot do so without violating its statutory mandate. In my opinion, $20 is a nominal penalty which denotes a lack of gravity. A reading of these citations indicates that at least on their face the possibility that some degree of gravity may have been present. I have been told nothing about any of the other six statutory criteria

predicated upon section 100.4 of the regulations of the Min Safety and Health Administration, 30 C.F.R. § 100.4 which provides for the assessment of a $20 single penalty for a violation MSHA believes is not reasonably likely to result in a reasonably serious injury or illness. These regulatio are not binding upon the Commission and indeed are not even relevant in these proceedings.

The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty assessm regulations adopted by the Secretary but rather that in a proceeding before the Commission the amount of the penalty to be assessed is a de novo determination based upon the si statutory criteria specified in section 110(i) of the Act and the information relevant thereto developed in the cours of the adjudicative proceeding. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983). Indeed, if this were not so, th Commission would be nothing but a rubber stamp for the Secretary.

The fact that MSHA may have determined that these violations are not "significant and substantial" as that term presently is defined by the Commission, is not determinative or even relevant in these proceedings. I agree with Administrative Law Judge Broderick that whether a cite violation is checked as significant and substantial is per se irrelevant to the determination of the appropriate penalty to be assessed. United States Steel Mining Co., Inc., 5 FMSHRC 934 (May 1983), PDR granted June 22, 1983.

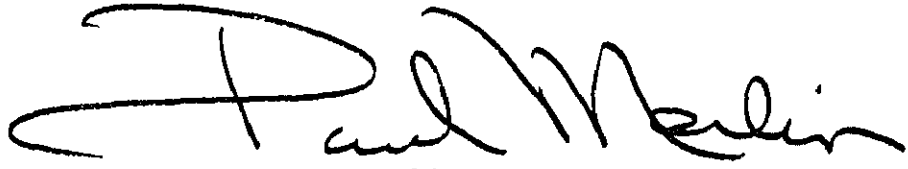
Regardless of the Secretary's regulations, once this Commission's jurisdiction attaches we have our own statutor responsibilities to fulfill and discharge. This can only b done on the basis of an adequate record.

Moreover, I cannot approve the $98 settlement for the remaining violation. This citation was issued for a failur to ground a wire in violation of section 56.12-25. On the citation form the inspector indicated occurrence of the feared event was reasonably likely, injury could be fatal and negligence was moderate. I do not believe I can predicate approval or disapproval of a proposed settlement on nothing more than boxes checked by an inspector. But I note that these checks, without more, indicate that the

ORDER

In light of the foregoing, it is Ordered that the olicitor's motion for settlement be Denied.

It is further Ordered that within 30 days from the date f this order the Solicitor file information adequate for me o determine whether the proposed penalties are justified nd settlement warranted. Otherwise, this case will be ssigned and set down for hearing on the merits.



Paul Merlin
Chief Administrative Law Judge

istribution:

ames H. Barkley, Esq., Office of the Solicitor, U. S. epartment of Labor, 1585 Federal Building, 1961 Stout treet, Denver, CO 80294 (Certified Mail)

ugene A. Lalonde, Esq., Casper Concrete Company, P. O. ox 30238, Billings, MT 59107 (Certified Mail)

MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Docket No. CENT 83-24
	:	A.C. No. 41-02867-03502
v.	:	
	:	Thurber Coal Mine
THURBER COAL COMPANY, Respondent	:	

DENIAL OF SETTLEMENT

ORDER TO SUBMIT INFORMATION

The parties have filed a motion to approve settlement for the seven violations involved in this matter. The proposed settlement is for the originally assessed amount. Si violations were assessed at $68 apiece and one violation wa assessed at $20.

The motion for settlement contains no discussion or analysis regarding the factual circumstances of the alleged violations. No information is given regarding gravity or negligence. The inspector checked various boxes on the citation forms indicating his opinion regarding levels of negligence and gravity but as I have indicated in other cases I cannot rely upon these "checks" as a basis for settlement approval when the Solicitor does not explain wha the checks mean. I recognize that the Solicitor's motion sets forth that in the 24 months prior to the inspection th operator was inspected 29 times and received 14 assessed violations. The motion further advises that payment of the proposed penalties will not impair the operator's ability t continue in business. However, in addition to being given insufficient advice about gravity and negligence, no information is given by the Solicitor regarding size and good faith abatement. I am unable to determine whether the proposed settlement amounts are appropriate.

With respect to the one proposed settlement amount of $20, I further make the following observations. This proposed settlement is a "single penalty assessment" apparentl

in a reasonably serious injury or illness. This regulati is not binding upon the Commission and is not a basis upo which I could approve a settlement.

The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty asses ment regulations adopted by the Secretary but rather that a proceeding before the Commission the amount of the pena to be assessed is a de novo determination based upon the statutory criteria specified in section 110(i) of the Act and the information relevant thereto developed in the cou of the adjudicative proceeding. Sellersburg Stone Compar 5 FMSHRC 287 (March 1983). Indeed, if this were not so, Commission would be nothing but a rubber stamp for the Secretary.

The fact that MSHA may have determined that this violation is not "significant and substantial" as that te presently is defined by the Commission, is not determinat or even relevant in this proceeding. I agree with Admin- istrative Law Judge Broderick that whether a cited violat is checked as significant and substantial is per se irrel to the determination of the appropriate penalty to be ass United States Steel Mining Co., Inc., 5 FMSHRC 934 (May 1983), PDR granted June 22, 1983.

Regardless of the Secretary's regulations, once this Commission's jurisdiction attaches we have our own statut responsibilities to fulfill and discharge. This can only done on the basis of an adequate record.

Finally, the fact of payment by the operator is not determinative of the Commission's duties and obligations this matter.

ORDER

In light of the foregoing, it is Ordered that the Solicitor's motion for settlement be Denied.

It is further Ordered that within 30 days from the da of this order the Solicitor file information adequate for to determine whether the proposed penalties are justified and settlement warranted. Otherwise, this case will be assigned and set down for hearing on the merits.

Paul Merlin
Chief Administrative Law Judge

Distribution:

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SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 83-183
Petitioner	:	A.C. No. 46-05806-03505
v.	:	
	:	No. 3 Mine
MAIDEN MINING COMPANY,	:	
Respondent	:	

PARTIAL APPROVAL AND PARTIAL DISAPPROVAL OF SETTLEMENT

ORDER TO SUBMIT INFORMATION

The Solicitor has filed a motion to approve settlement for the four violations involved in this matter. The proposed settlement is for the originally assessed amounts. Three violations were assessed at $20 apiece and one violation was assessed at $126. The operator has already tendered payment of $186.

Citation No. 2122147 was issued because a disconnect plug was not marked for identification. The violation was serious and the operator was moderately negligent. The Solicitor proposes to settle this violation for the original assessment of $126. I accept the Solicitor's representations.

The Solicitor proposes to settle the other three citations for the original assessments of $20 apiece. In my opinion, $20 is a nominal penalty which denotes a lack of gravity. The three citations involve accumulations of coal and coal dust, and permissibility violations. A reading of these citations indicates on their face the possibility that some degree of gravity may have been present. The Solicitor provides no information about the gravity or negligence involved in these citations. I cannot approve these proposed settlements on the basis of the information submitted to date.

The $20 "single penalty assessments" were obviously predicated upon section 100.4 of the regulations of the Mine Safety and Health Administration, 30 C.F.R. § 100.4 which provides for the assessment of a $20 single penalty for a

The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty assessment regulations adopted by the Secretary but rather that in a proceeding before the Commission the amount of the penalty to be assessed is a de novo determination based upon the six statutory criteria specified in section 110(i) of the Act and the information relevant thereto developed in the course of the adjudicative proceeding. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983). Indeed, if this were not so, the Commission would be nothing but a rubber stamp for the Secretary.

The fact that MSHA may have determined that these violations are not "significant and substantial" as that term presently is defined by the Commission, is not determinative or even relevant in this proceeding. I agree with Administrative Law Judge Broderick that whether a cited violation is checked as significant and substantial is per se irrelevant to the determination of the appropriate penalty to be assessed. United States Steel Mining Co., Inc., 5 FMSHRC 934 (May 1983), PDR granted June 22, 1983.

Regardless of the Secretary's regulations, once this Commission's jurisdiction attaches we have our own statutory responsibilities to fulfill and discharge. This can only be done on the basis of an adequate record.

I will not order that the case be dismissed with respect to Citation No. 2122147 pending final disposition of the three other citations.

ORDER

In light of the foregoing, it is Ordered that the Solicitor's motion for settlement be Denied.

It is further Ordered that within 30 days from the date of this order the Solicitor file information adequate for me to determine whether the proposed $20 penalties for the

ree citations discussed above are justified and settlement
rranted. Otherwise, this case will be assigned and set
wn for hearing on the merits.

Paul Merlin
Chief Administrative Law Judge

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 82-335
	:	A.C. No. 36-00970-03503
v.	:	
	:	Maple Creek No. 1 Mine
U.S. STEEL MINING COMPANY, INC., Respondent	:	

DECISION

Appearances: Covette Rooney, Esq., Office of the Solicitor, Department of Labor, Philadelphia, Pennsylvani and Frederick W. Moncrief, Esq., Office of the Solicitor, U.S. Department of Labor, Arlingtor Virginia, for Petitioner;
Louise Q. Symons, Esq., Pittsburgh, Pennsylvar for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

This is a civil penalty proceeding wherein the Secretary penalties for five alleged violations of mandatory health and standards. Petitioner filed a motion for summary decision wi respect to the violation charged in Citation No. 9901317 whic denied by an order issued April 6, 1983. Pursuant to notice, case was heard in Uniontown, Pennsylvania, on April 27 and 28 During the course of the proceeding, Petitioner moved to with the petition with respect to one citation - 9901316 - on the that it could not establish a violation, and to have the cita vacated. The motion was granted on the record. Respondent a that the violations charged occurred but challenged the desig of the violations as significant and substantial and contested amount of the penalties proposed. Joe Garcia, Thomas K. Hodo William H. Sutherland, William R. Brown, Alvin Shade and Gera Davis testified for Petitioner. Samuel Cortis, Joseph G. Rit Paul Shipley and John Pecko testified for Respondent.

1. At all times pertinent to this proceeding, Respondent owned and operated an underground mine in Washington County, Pennsylvania, known as Maple Creek No. 1 Mine.

2. Respondent has an annual production of coal of approxi 15 million tons. The subject mine has an annual production of approximately 540 thousand tons. Respondent is a large operato

3. Between June 3, 1980 and June 2, 1982, Respondent's hi shows 656 paid violations at the subject mine. Of these, four violations of 30 C.F.R. § 70.101, 71 were violations of 30 C.F. § 75.200, and 73 were violations of 30 C.F.R. § 75.503, the hea and safety standards involved in this case. This is a moderate history of prior violations, and penalties otherwise appropriat will not be increased because of this history.

4. Each of the violations charged herein occurred except otherwise found herein, and in each case the violation was abat promptly and in good faith.

5. The imposition of penalties for the violations will no affect Respondent's ability to continue in business.

6. Respondent is subject to the provisions of the Federal Safety and Health Act of 1977 in the operation of the subject m and the undersigned Administrative Law Judge has jurisdiction o the parties and the subject matter of this proceeding.

CITATION NO. 9901317 ISSUED MAY 27, 1982

1. On October 26, 1981, a respirable dust technical inspe was conducted on mechanized mining unit 010-0 in the subject mi A sample collected at that time for occupation 036 showed 10 pe quartz. Based on this finding the respirable dust limit on the was reduced to 1.0 mg/m3. A sample taken on February 10, 1982, showed 8 percent quartz and the dust limit was raised to 1.2 mg In response to a request from Respondent, a technical investiga was conducted from February 22 to March 1, 1982. This showed a average dust concentration of 2.3 mg/m3. A citation was issued a violation of the dust standard. The same investigation showe quartz percentage of 7 and the respirable dust level was raised 1.4 mg/m3. Between May 11 and 18, five respirable dust samples taken which showed an average concentration of 1.8 mg/m3 for wh the citation with which we are here concerned was issued.

It can also cause silicosis, a progressive, serious diseas
lungs resulting from deposition of silica in the lung and
reaction to it. Coal workers pneumoconiosis and silicosis
reasonably serious illnesses.

3. An exposure to 1.8 mg/m3 of respirable dust which
approximately seven percent quartz over a 2-month period,
in itself cause silicosis but would contribute in a substa
to the risk of acquiring silicosis. See Secretary v. U.S.
Mining Co., Inc., 5 FMSHRC 46, 67-68 (1983) (ALJ).

4. The violation of 30 C.F.R. § 70.101 which occurre
case was reasonably likely to result in a reasonably serio
Therefore, it was of such nature as could significantly an
tially contribute to the cause and effect of a coal mine s
health hazard. See Secretary v. Cement Division, National
Company, 3 FMSHRC 822 (1981); Secretary v. U.S. Steel Mini
Inc., supra; I should note that the precise issue raised b
dent in this case was raised by it in the case of Secretar
U.S. Steel Mining Co., Inc., supra, before Judge Kennedy.
by a tribunal of competent jurisdiction is res judicata in
quent proceeding between the same parties involving the sa
46 Am. Jur. Judgments § 397 (1969); 1B Moore's Federal Pra
§ 0.405 (1982). Factual differences not essential to the
judgment do not render the doctrine inapplicable. Montana
States, 440 U.S. 147 (1979); Hicks v. Quaker Oats Co., 662
(5th Cir. 1981). Respondent had a full and fair opportuni
igate this issue before Judge Kennedy and to petition the
for review. Based on the doctrine of res judicata, it sho
precluded from relitigating it here. The government, howe
not raise this issue, and the case was heard on the merits
conclusion here is based on a consideration of the evidenc
case before me. Respondent should not be permitted to end
raise this issue, however. I accept and adopt the analysi
conclusions of Judge Kennedy that exposure to respirable d
a quartz content that exceeds 100 micrograms per cubic met
constitutes a significant risk of a serious health hazard.
Consolidation Coal Co. v. Secretary, 5 FMSHRC 378 (1983) (

5. There is no evidence that the violation was the r
Respondent's negligence.

6. I conclude that an appropriate penalty for the vi
is $200.

had been installed by the crew and no attempt to torque the b
had been made prior to the citation being issued. The roof c
plan is not violated by the fact that the torque wrench was d
tive, but only if the operator fails to torque the bolts in a
dance with the plan. Despite the fact that Respondent at the
commencement of the hearing admitted a violation, I conclude
the evidence does not show a violation of the roof control pl
will dismiss the petition with respect to this citation, and
citation will be vacated.

CITATION NO. 1249541 ISSUED JUNE 1, 1982

1. The subject citation was issued charging a violation
30 C.F.R. § 75.503 because of a permissibility violation in a
shuttle car resulting from a conduit being pulled out of the
ing gland. The violation was originally designated as signif
and substantial but this designation was subsequently deleted

2. The violation was not serious but it was the result
Respondent's negligence. Respondent had been cited for the s
condition "quite a few times."

3. I conclude that an appropriate penalty for the viola
is $75 based on the criteria in section 110(i) of the Act.

CITATION NO. 1250107 ISSUED JUNE 3, 1981

1. The subject citation was issued because of a permiss
violation, 30 C.F.R. § 75.503, resulting from the absence of
on the control compartment on the foot switch of a shuttle ca

2. In the event of methane entering the control compart
an internal explosion would be less likely to be contained wi
the compartment and could get into the mine atmosphere. The
car was energized and was being prepared to load coal from th

3. The subject mine has been classified as a gassy mine
Ignitions have occurred in the subject mine.

4. I conclude that the violation was reasonably likely
cause an injury of a reasonably serious nature. The citation
properly designated significant and substantial. The violati
serious. The absence of the bolt should have been known to R
dent. The violation was the result of Respondent's negligenc

T IS ORDERED

(1) The penalty proceeding is DISMISSED with respect to the iolations charged in Citation Nos. 9901316 issued May 27, 1982, nd 1250101 issued May 21, 1982, and the citations are VACATED.

(2) Respondent shall pay within 30 days of the date of this ecision civil penalties for the following violations:

Citation No.	Date	Penalty Amount
9901317	05/27/82	$200
1249541	06/01/82	$ 75
1250107	06/03/82	$200
		$475

(3) The citation Nos. 9901317 and 1250107 were properly esignated "significant and substantial" and are AFFIRMED as issue

(4) In Citation No. 1249541, the designation "significant ar ubstantial" was deleted.

James A. Broderick
Administrative Law Judge

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Applicants	:	Docket No. EAJ 83-1
	:	
v.	:	
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	

DECISION

Statement of the Case

Following my decision dismissing a civil penalty proceeding brought by the Secretary of Labor under section 110(c) of the Mine Safety Law, 4 FMSHRC 1816 (1982), two of the six individuals charged moved for an award of costs and attorneys fees. 1/ Jurisdiction over the claim arises under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504(a).

The bench decision dismissing the charges occurred after lengthy pretrial discovery and a four-day evidentiary hearing. It was predicated on a failure of proof with respect to both the underlying violation and applicants' alleged knowing participation therein.

Thereafter, counsel for the Secretary waived his right to challenge the tentative bench decision; agreed there was insufficient evidence to show applicants knowingly authorized, ordered or carried out the violation charged; joined nunc pro tunc applicants' motion to dismiss at the close of the

1/ The gravamen of the charge was that applicants, a superintendent and a foreman at the Annapolis, Missouri quarry of the GAF Corporation, with knowledge that the braking system of a large haulage truck was unsafe, authorized or ordered miners to operate the truck on a steep haulage road thereby endangering their lives. The relevant mandatory safety standard, 30 C.F.R. 56.9-2, prohibits the use of self-propelled equipment with "defects affecting safety."

stated in the decision of the trial judge. 2/

An exhaustive review of the record shows the Secretary's evidence failed to rise above a level of suspicion. Indeed, the countervailing evidence as to the drivers' negligence and reckless disregard for safe operation of the truck, which both the underlying investigation and the solicitor's pretrial discovery largely ignored, convincingly shows that the government's litigation position was factually and legally untenable. The failure to properly evaluate the probative force of this evidence, including the implausibili of the characterizations of the operative facts by the Secretary's witnesses, led to an improvident decision to proceed where no prosecutable offense had, in fact, been committed.

2/ The Secretary contends the trial judge's denial of applicants' motion to dismiss at the close of MSHA's case-in-chief shows the government's litigation position was substantially justified. As my decision made clear, because of the need for clarification of the testimony given by the bench witness Warnecke I resolved all questions of credibility and conflicts in favor of the Secretary. This afford applicants the opportunity to present the trial judge with a full exposition of the claimed flaws in the government's position. The first benefit of that decision was the Secret accedence in the correctness of the trial judge's tentative decision as to the final disposition of the matter. The second benefit was the light which that record affords for making this decision.

For these reasons, I find the Secretary's threshold contention without merit. The Secretary vigorously opposed the motion to dismiss at the close of MSHA's case-in-chief although at that time counsel had to be painfully aware of the unreliability of MSHA's witnesses. There is authority, of course, for holding the government liable for attorney fees and expenses where it adopts, even briefly, a litigation position lacking substantial justification. H.R. Rep. 1418, 96th Cong., 2d Sess., 11 (1980); S. Rep. 253, 96th Cong., 1st Sess. 7 (1979); Stanley Spencer v. NLRB, D.C. Cir. No. 82-1851, decided June 28, 1983, Slip Op. at 34, n. 58. But since counsel for applicants' has not separately argued the point I will treat it as subsumed under the

ants' knowledge of the complaining drivers' improper and unsafe operating procedures justified applicants' reliance on brake adjustments to correct the condition and did not violate applicants' duty under the law to provide a vehicle capable of safe operation.

As the court of appeals has recently pointed out, the fact that government counsel may have felt reasonably justified in putting applicants to their proof does not mean the agency was substantially justified in pursuing the litigation. One of the principal purposes of the EAJA was to deter prosecutors from pursuing weak cases or to pay the price in sizeable awards of attorneys fees. 3/ Stanley Spencer, supra, Slip Op. at 22, n. 40; 39-41. Thus, it would be improper for me to accept as a substantial justification the bald assertion that the testimony of the complaining drivers, if uncritically accepted, was sufficient to warrant this prosecution. As the court noted, where the controversy revolves around competing characterizations of the underlying facts, here a defect in the braking system allegedly affecting safety, the "trial judge must assess the plausibility of the government's original depiction of the situation that gave rise to the suit." This "involves evaluation of the probative force of evidence submitted by the government." Stanley Spencer, supra at 51-52.

The government's only disinterested witness, Mr. Zancauske, was reliable but gave no evidence probative of a defect in the braking system affecting safety. It is true that he testified there might have been a defect in the braking system but he could not say it affected safe operation of the truck. On the other hand, he unreservedly expressed the view that the principal problem was the drivers' habit of riding the brakes on the steep inclines instead of gearing down and engaging the retarder. Counsel, who admitted he had never interviewed Mr. Zancauske before he testified, made a serious error in believing Mr. Zancauske would provide probative evidence of the underlying violation. Absent reliable, probative and substantial evidence of the underlying

3/ Indeed the EAJA seems to be a specific grant of authority to review the exercise of prosecutorial discretion.

for an individual to have knowledge of the unknowable or of the existence of the nonexistent.

A review of the investigative file further shows the inspection and investigation were botched due to a lack of diligence, if not competence, on the part of both the inspector and investigator. Nor did their failure to appear as witnesses because they chose to take a vacation enhance the worth of their efforts.

Applying what I understand is the applicable standard, a standard which Congress and the courts deem to be "slightly more stringent than one of reasonableness," I conclude that neither the underlying nor the ligitation position of the Secretary was substantially justified. 4/ S. Rep. 96-253, supra, at 8; Stanley Spencer, supra, Slip Op. 16, n. 31, 25, 39.

Because this case presents a matter of first impression under the EAJA for the trial judge and the Commission as well as an issue of eligibility which has never before been decided by any tribunal, administrative or judicial, I set forth below my formal findings and conclusions.

Findings and Conclusions

Attorney Fees - Eligibility

The Equal Access to Justice Act (EAJA) requires the award of attorney fees and expenses to a qualified party prevailing against a regulatory agency unless the administrative law judge who heard and determined the matter finds

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4/ While the EAJA indicates that it was the Secretary's position "as a party," on which I should focus, I agree with the court's observation that "Examination of the variety of kinds of controversies covered by the Act reveals that, in the large majority of contexts, it makes no functional difference how one conceives of the government's 'position.' In actions brought by the United States, the governmental action that precipitates the controversy almost invariably is its litigation position." Stanley Spencer, supra at 25. That was certainly true in this case.

brought under section 110(c) of the Act. 30 U.S.C. § 823
The Commission has determined therefore that they are
authorized to hear and determine claims for fees and exper
arising under the EAJA against the Department of Labor wh
is charged with responsibility for enforcing the Mine Safe
Law. 29 C.F.R. 2704.201(f). Unlike the old line regulato
agencies such as the FTC, SEC, ICC, FCC, CAB and NLRB, the
Federal Mine Safety and Health Review Commission (FMSHRC)
does not initiate or prosecute the adversary administrativ
adjudications that it hears and decides. This Commission
an independent administrative agency that functions as an
administrative trial and appellate court. 30 U.S.C. § 82
The Commission possesses only adjudicative powers, has no
prosecutorial prerogatives, is not a party to proceedings
brought before it, and is not responsible for the actions
the Department of Labor in initiating or prosecuting alle
violations of the law. Under the Commission's rules, awar
are made by the Commission and its judges against the Depa
ment of Labor. 29 C.F.R. 2704.108. Findings by the Comm
trial judges are final and conclusive if supported by subs
tial evidence. Chacon v. Phelps Dodge Corporation, D.C.
Cir. No. 81-2300, decided June 7, 1983, Slip Op. at 9-10.
Judicial review is available in the courts of appeals unde
an abuse of discretion standard only to the extent that a
decision denies an award or there is a dispute over the
calculation of an award. 5 U.S.C. § 504(c)(2). 6/

5/ 5 U.S.C. § 504(a) provides:

> An agency that conducts an adversary adjudication sha
> award, to a prevailing party other than the United
> States, fees and other expenses incurred by that part
> in connection with that proceeding, unless the adjudi
> cative officer of the agency finds that the position
> the agency was substantially justified or that specia
> circumstances make an award unjust.

6/ Stewart, Beat Big Government and Recover Your Legal
Fees, 69 ABAJ 912 (1983); Few Claimants Win Fee Awards in
Agency Actions, Legal Times, Monday, April 25, 1983, p. 1;
Courts Debate Reach of EAJA, Legal Times, Monday, May 16,
1983, p. 16.

warranting denial of applicants' eligibility, however, is the fact that they incurred no expense in defending themselves

Applicants' employer, GAF Corporation, a large, multinational corporation with more than 500 employees and a net worth that exceeds $5,000,000 authorized one of its full-time house counsel, Mr. Patrick Daly, to represent applicants with the understanding that (1) GAF would defray all of the expense involved without right of reimbursement from applicants and (2) if applicants prevailed Mr. Daly would be entitled to keep whatever attorney fees and expenses he succeeded in recovering. If the allowance of fees for Mr. Daly's services is in accord with the purposes and policy of the Act, I can perceive no valid basis for denying applicants' eligibility even if payment to Mr. Daly amounts to a bonus to him over and above the salary and benefits he earned from GAF during the period of his pro bono representation of applicants. Under the Commission's rules and the applicable case law the fact that services are rendered on a pro bono basis is no bar to the recovery of fees for such services by a prevailing party. Rule 2704.106(a); Hornal v. Schweiker, 551 F. Supp. 612, 615-616 (M.D. Tenn. 1982); Kinne v. Schweiker, Civ. No. 80-81, D. Vt., December 29, 1982. Compare Munsey v. FMSHRC, No. 82-1079, D.C. Cir., March 11, 1983. Contra, Cornella v. Schweiker, 553 F. Supp. 240, 245-248 (D.S.D. 1982).

The language of the Act and its legislative history lead me to conclude the underlying policy of the EAJA is served by awarding applicants Mr. Daly's fees regardless of the source of the funds advanced to enable him to defend applicants. The Act, as well as the House and Senate Committee Reports, show that to be allowable fees and expenses need not be actually owed to attorneys. The Act provides that awards are to be based on "prevailing market rates," 5 U.S.C. § 504(b)(1)(A), and that this is to be the measure of the prevailing party's recovery. The "measure" of applicants' entitlement has nothing to do with whether they owe all, some, or none of it to the attorney or anyone else. The House Report states:

> In general, consistent with the above limitations [$75.00 per hour], the computation of attorney fees should be based on prevailing market rates without

the same effect. For these reasons, I conclude that in considering applicants' claims for Mr. Daly's fees the source of the funds used to defray Mr. Daly's expenses pendente lite and the actual fee arrangement between applicants and Mr. Daly is irrelevant.

On the other hand, I find special circumstances bar the award of fees and expenses for services rendered by outside attorneys employed by GAF to assist Mr. Daly in his representatio of applicants. These attorneys did not enter appearances in the matter on behalf of applicants, had no colorable attorney-client relationship with applicants, and no pro bono or other fee arrangement with applicants. They were employed by Mr. Daly in his capacity as labor attorney for GAF on the understanding that their billings would be sent to and paid for by GAF. These fees and expenses, which totalled $13,139.31, were, in fact, paid by GAF Corporation for the services rendered. Under these circumstances, payment of these sums to Mr. Daly or applicants would be a pure windfall. Further, since the outside attorneys have been paid by GAF the statute does not authorize further payment to them.

The remaining question is whether GAF Corporation qualifies directly for reimbursement of the fees and expenses incurred on behalf of applicants. I find payment of these monies is not compensable to GAF because this tax deductible business expense was made not only on behalf of applicants but in pursuit of GAF's own business interests. These were GAF's interests in (1) supporting and defending its supervisory management against what it firmly believed to be trumped-up charges of reckless disregard for safety and (2) creating a precedent against MSHA's easy acceptance of charges of wrongdoing against supervisors by union representatives and rank-and-file miners. In other words, GAF had a large stake in this litigation from the standpoint of preserving management's valued right to manage its quarry without unwarranted intrusion on that right by the union and MSHA.

While it is clear that a deterrent to improvident regulatory action is in accord with the purposes and policy of the Act for eligible applicants, here GAF was not an eligible applicant. 5 U.S.C. § 504(b)(1)(B); H.R. Rep. 96-418, supra, at 15. Because of its size and wealth the

the government under the applicable provisions of the Internal Revenue Code.

Under the circumstances shown, I believe GAF's participation was sufficient to make it a privy to applicants' defense. The claim for fees and expenses for the outside attorneys and law firms is therefore, disallowed on the ground that this expense was primarily incurred on behalf of an entity ineligible to receive compensation under the terms of the statute. 7/ It is also denied on the ground that to allow an award of the outside attorney fees and expenses to applicants or GAF would, under the special circumstances shown, be unjust and inequitable. 8/

The Standard

The EAJA does not require the Government to compensate prevailing parties automatically for fees and expenses. Instead, it adopts a compromise position, embodied in the standard of "substantial justification," which "balances the constitutional obligation of the executive branch to see that the laws are faithfully executed against the public interest in encouraging parties to vindicate their rights." H.R. Rep. No. 96-1418, supra, at 10. In particular, Congress rejected the liberal standard of recovery under the civil rights statutes which generally entitle prevailing plaintiff

7/ Rule 2704.104(g) provides:

> An applicant that participates in a proceeding primarily on behalf of one or more other persons or entities that would be ineligible is not itself eligible for an award.

8/ The House Report notes the "special circumstances" exception was intended to give the trial judge "discretion to deny awards where equitable consideration dictate an award should not be made." H.R. Rep. 96-1418, supra, at 11.

9/ An analogous provision, 28 U.S.C. § 2412 affords a similar entitlement to attorney fees and expenses to prevailing parties in the courts.

Park Enterprises, Inc., 390 U.S. 400, 402 (1968).

At the same time, Congress rejected a standard propose by the Department of Justice which would have authorized recovery of fees and expenses against the Government only if a prevailing party could prove that the government's positic was arbitrary, frivolous, unreasonable, or groundless. H.R. Rep. 96-1418, supra, at 10, 14. See, Christianbery Garment Co. v. EEOC, 434 U.S. 412, 420-421 (1978). Such a restricti approach, Congress reasoned, would maintain significant barriers to recovery of fees by prevailing litigants and would not appreciably diminish existing deterrents created by the high cost of vindicating legal rights in the face of arbitrary and unreasonable government action. Id.

The standard of recovery that ultimately emerged represents a "middle ground" between an automatic award of fees to a prevailing party engaged in litigation with an agency and the standard proposed by the Department of Justice. Although the Act itself is silent on the meaning of the "substantially justified" standard, the House Report contains an instructive passage:

> The test of whether or not a Government action is substantially justified is essentially one of reasonableness. Where the Government can show that its case had a reasonable basis both in law and fact, no award will be made. In this regard the strong deterrents to contesting Government action require that the burden of proof rest with the Government. This allocation of the burden, in fact, reflects a general tendency to place the burden of proof on the party who has readier access to and knowledge of the facts in question. The committ believes that it is far easier for the Government, which has control of the evidence, to prove the reasonableness of its action than it is for a private party to marshal the facts to prove that the government was unreasonable.
>
> * * * * * *
>
> The standard, however, should not be read to raise a presumption that the Government position was not substantially justified, simply because it lost the case. Nor, in fact, does the standard require the

preliminary decision to initiate the proceeding. Contra, Stanley Spencer, supra.

In cases charging knowing violations by supervisors, MSHA acts as the investigator. The decision as to whether there is a prosecutable offense and the conduct of the prosecution, however, rests with the Office of the Solicitor, Department of Labor. While the record is replete with indications of the ineptness of the investigation, this would not require an award if the solicitor's pretrial preparation and discovery filled the voids in the investigative record to the point where it can fairly be said that by the time of the evidentiary hearing the solicitor had substantial, legally competent evidence of the violations charged. If, on the other hand, the solicitor's case, as presented, shows that at no time did he have such relevant evidence as a reasonable mind might accept as adequate to support a finding that the underlying violation occurred and that applicants knew or should have known of the putative condition I cannot find the Secretary's litigation position was substantially justified.

Since the advent of the EAJA, the quality of departmental in-house lawyering must obviously improve. No longer may the solicitor "wing" it or rest on MSHA's recommendation as the justification for pursuing weak and tenuous cases. The solicitor must make an independent evaluation of the probative force of his evidence in the light of the expected defense and whatever else fairly detracts from the probative value of his evidence.

The need to raise the level of the plane of litigating competence in administrative proceedings was foreshadowed by the legislative history's admonition that the EAJA was intended "to caution agencies to carefully evaluate their case and not to pursue those which are weak or tenuous." 10/

10/ The Act was intended to "induce government counsel to evaluate carefully each of the various claims they might make in a particular controversy, and to assert only those that are substantially justified." Stanley Spencer, supra, at 36.

Further, because this was a case in which the government conceded only after there was a substantial investment of effort and money the Secretary was required to make an "especially strong showing that [his] persistence in litigation was justified." Stanley Spencer, supra, at 43. Compare Id. 16, n. 31, 22, n. 40, 33-34, n. 58.

Insight as to the Secretary's burden is gleaned from the following passage of the legislative history:

> Certain types of case dispositions may indicate that the Government action was not substantially justified. A court should look closely at cases, for example, where there has been a judgment on the pleadings or where there is a directed verdict or where a prior sui on the same claim had been dismissed. Such cases clearly raise the possibility that the Government was unreasonable in pursuing the litigation.

H.R. Rep. No. 96-1418, supra, at 10-11; S. Rep. No. 96-253, supra, at 6-7.

Here, of course, the record shows that after protracte litigation the Secretary acceded by joining the applicants' motion to dismiss the charges.

Nevertheless, the Secretary argues that because the underlying case involved questions of credibility it was pe se "reasonable" for government counsel to pursue the litiga tion. I do not agree.

A central objective of the Act was to require government counsel to carefully evaluate the worth of informers' testimony. No longer may counsel for the Secretary offer such testimony "for whatever its worth." At least not without risk of the imposition of substantial awards for attorney fees and expenses.

As the court of appeals so trenchantly observed, the purposes of the Act will "not be promoted by treating the question of whether the position taken by the United States in a particular case was 'substantially justified' as

accept their stories at face value does not justify a conclu sion that the decision to proceed, followed by dogged pursui of a "long shot" was substantially justified.

I conclude, therefore, that the standard to be applied in determining whether the Secretary's case was substantiall justified was not whether it was arguably or reasonably justified by the investigatory record but whether an objective evaluation of the probative force of the evidence adduced at the hearing shows that there was substantial credible evidence that the braking system of the Euclid truck had a defect affecting safety; that applicants knew or should have known of this condition; and that with such knowledge or awareness they tacitly ordered or authorized continued use of the truck. 11/

Evidence which was discredited or which did not directl or circumstantially raise an inference of the existence of an operative fact was not substantial and therefore did not constitute a substantial justification for the agency's litigation position. In this context substantial evidence is used, to mean "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" and not "a certain quantity [or preponderance] of evidence." Steadman v. SEC 450 U.S. 69, 98-100 (1980).

11/ Substantial evidence may consist of either direct or circumstantial evidence. It need not be dispositive but standing unrebutted must be capable of raising an inference of the existence of the operative fact or facts in issue. If it does not raise such an inference it is not substantial and cannot provide a substantial justification for prosecution of a case. I recognize that statutory formulations for reviewing discretion are among the most unsatisfactory of legislative standards. Words such as "substantial justification" or "abuse of discretion" state conclusions, not premises from which a conclusion may be derived. While these verbal formulas provide the terms in which the conclusion of invalidity may be pronounced, they do nothing to articulate the process of analysis by which the issue of invalidity is to be litigated and decided.

perform repairs on the braking system of the Euclid truck (GX-1). This document, a purchase order, invoice, and service report covering the work done, was offered through Mr. Jerry D. Zancauske, service manager for Midco, to establ (1) the fact of violation under the strict liability standar of the Act, and (2) culpable conduct, i.e., consciousness of fault through awareness of the existence of a defect affecti safety on the part of the six individual respondents (Tr. 38-39).

Counsel for respondents objected to the receipt of this document and testimony pursuant to the exclusionary rule set forth in Rule 407 of the Federal Rules of Evidence (Tr. 24, 39). Rule 407 provides:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment. [12]

The trial judge admitted the document and Mr. Zancauske's testimony solely to prove the fact of violation under the strict liability standard of the Mine Safety Law. (Tr. 39-41). 13/

12/ The document was never used for impeachment nor was the fact of ownership, control or feasibility of precautionary measures ever controverted.

13/ The trial judge also admitted the invoice, service report and GAF's purchase order, all of which were part of the same document, as records kept in the regular course of business (Tr. 64, 75-76), and as an implied admission under Rules 801(d)(2)(A), (B), (D), and 803(6) (Tr. 78). Since this evidence was barred under Rule 407, it was not properly received under these rules. 23 Wright & Graham, Federal Practice & Procedure § 5284, at 109-110 (1980).

prosecuting this matter was substantially justified I find it necessary to consider whether in view of the practical unaniminity of the decisions interpreting Rule 407 as precluding the receipt of evidence of post-event repairs to show strict liability, negligence, or culpable conduct it was reasonable for the Secretary to rely on this inadmissible evidence as the keystone of his case against these applicants. I conclude it was not. 14/

Rule 407 of the Federal Rules of Evidence bars post-event remedial evidence to prove (1) strict liability, (2) negligence, or (3) culpable conduct. The rationale for this exclusionary rule is the public interest in encouraging the adoption of safety measures and the questionable relevancy of evidence of subsequent repairs. 2 Wigmore, Evidence § 283, at 151 (3 Ed. 1940); Columbia and P.S.R.R. v. Hawthorne, 144 U.S. 202, 207-208 (1892); Weinstein's Evidence, ¶ 407(02) (1982); Louisell and Mueller, Federal Evidence, §§ 163, 164 (1978); 23 Wright & Graham, Federal Practice and Procedure, § 5382 (1980).

While there is, and will probably continue to be, considerable debate, at least among the commentators, over whether the quasi-privilege created by Rule 407 encourages people to correct unsafe conditions or practices, there is practical unanimity among the courts of appeals on the question of relevance. Because of its equivocal nature, the courts have held that evidence of subsequent repair has little relevance with respect to whether a defect affecting safety existed in a machine or product prior to its repair.

14/ Even if properly received, which I find it was not, the repair report was of little or no probative value since standing alone it did not establish that the drivers' complaint over the need for frequent adjustments was attributable to any defect affecting safety in the equipment. Further, Mr. Zancauske's testimony served only to corroborate the respondents' claim that the principal defect affecting safety was the improper driving habits of the drivers assigned to operate the equipment (Tr. 104-105).

The commentators also favor the view that Rule 407 does not apply in strict liability cases. Again the federal circuit courts have disagreed. Research discloses that long before this case went to trial it had been authoritatively held in the First, Second, Third, Fourth, Fifth, Sixth and Seventh Circuits that post hoc remedial measures were not admissible in strict liability cases. Grenada Steel Industr supra, at 888; Oberst v. International Harvester Company, 640 F.2d 863, 866 & n. 5 (7th Cir. 1980). Compare DeLuryea v. Winthrop Labs., 697 F.2d 222, 229 (8th Cir. 1983).

Counsel for the Secretary was chargeable with knowledge of these developments in the law of evidence, including the fact that the Supreme Court had denied certiorari in two of the leading cases that support application of the exclusiona rule in strict liability proceedings. Werner v. Upjohn Co., 628 F.2d 848 (4th Cir. 1980); cert. denied, 449 U.S. 1080 (1981); Cann v. Ford Motor Co., 658 F.2d 54, 59-60 (2d Cir. 1981), cert. denied ___ U.S. ____, 72 L Ed. 484 (1982). In Cann, the court observed:

> The failure of Rule 407 to refer explicitly to actions in strict liability does not prevent its application to such actions. When Congress enacted the Federal Rules of Evidence, it left many gaps and omissions in the rules in the expectation that common law principles would be applied to fill them . . . . The application of those principles convinces us that although negligence and strict product liability causes of action are distinguishable, no distinction between the two justifi the admission of evidence of subsequent remedial measur in strict product liability actions. Id. at 60.

The question of admissibility aside, a review of the totality of the evidence as to the repairs effected by Midco shows the Secretary was not justified in believing the brakes on the Euclid truck were defective at the time the closure order issued. Mr. Zancauske candidly admitted that while he supervised the brake repairs he had no personal knowledge or "hands on" experience with the condition of the brakes either before or after the closure order issued and that from the service report he could not testify as to what the "holding ability or stopping ability of the brakes of this truck" were prior to the time Midco worked on it (Tr.

Most telling was the following colloquy between counsel
the Secretary and Mr. Zancauske:

Counsel:

Q. Can you explain what it means to adjust the br
on this type of machine, on this very machine, let's sa
the Euclid truck?

Judge: If you know.

Counsel:

Q. If you know. If you were to adjust the brakes
they get hot and have to be backed off, what does that
indicate to you, sir?

A. That somebody might be riding the brakes over-
heating them.

Q. And if this continues over a two month period
practically every eight-hour shift at this quarry, and
sometimes even eight and nine times during this shift t
the brakes have to be adjusted they get hot and have to
backed off, and this occurs for a two month period, wha
would that indicate to you, sir?

A. Well you could assume several things. One, th
the operator is driving too fast, he's not using the re

Q. Let's assume he's using the retarder.

Judge: Let him answer the question, don't interru
Go ahead, sir.

A. Not using the retarder, he's driving too fast,
the hauls are in such a short sequence that the brakes
having to be used too much, that maybe not all of the
wheels are not holding to their ability that they were
designed for.

* * * * *

Counsel:

quarry foreman and GAF's expert on the repair and maintenance of the Euclid truck gave substantially the same reasons for the need for repeated adjustments to the brakes, namely, the fact that the complaining drivers drove too fast, failed or refused to use the retarder and continually rode the brakes on the steep inclines thus overheating the brakes and impairing their braking power (Tr. 861-868).

Counsel for the Secretary admitted neither he nor MSHA's investigator had interviewed either Mr. Zancauske or Mr. Weigenstein before they testified and apparently had no idea that they would be in agreement as to the causes for the brakes overheating and losing their braking power.

Despite this the Secretary contends that he was substantially justified in pursuing these matters because (1) a mechanic of admittedly limited experience and knowledge but who worked on the truck believed the adjustments were not effective to remedy the condition because of a break in a seal on the right rear wheels which allowed grease to leak on the brake lining causing the lining to crystallize and lose braking power, (2) the mechanic related this defect to applicants at a meeting on February 15, 1980, (3) applicants reportedly took no corrective action but authorized continued use of the truck, and (4) Mr. Zancauske the service manager for Midco who supervised the post-citation repair work believed that if there was oil or grease on the right rear brake lining it could result in a "slipping effect" on that wheel assembly that could diminish the degree of friction necessary for proper braking of the truck.

Facts developed on cross examination showed that the mechanic's testimony was highly unreliable. He was an individual with an obviously selective memory and little experience as a heavy equipment mechanic. The only completely candid testimony he gave was persuasive of the fact that he had never pulled the right rear wheel assembly of the truck to examine the alleged oil or grease leak and that the crystallization of the lining on the other wheels was, he believed, due to the complaining drivers' penchant for riding the brakes down the steep grades (Tr. 324, 327, 364). Had a thorough pretrial interview of the witness been

applicant Collins assigned applicant Kelley to investi
the complaints about the truck, (2) Mr. Kelley went to
day shift driver, Mr. Warnecke, and asked him to check
brakes, (3) Mr. Warnecke checked the brakes and reporte
they were "adequate," (4) the truck was not operated t
after (because of the intervening weekend and Washingt
Birthday holiday) until Tuesday, February 19, 1980, (5
Mr. Collins told Mr. Weigenstein the quarry foreman wh
over 30 years experience in maintaining heavy haulage
ment (20 years on this truck alone) to perform a thoro
check of the braking system of the truck on the afterno
Tuesday, February 19, 1980, (6) that Mr. Weigenstein t
the truck out of service on the evening shift of Tuesd
February 19, and for four hours performed a complete o
haul of the braking system, (7) that Mr. Weigenstein d
find any measurable amount of oil or grease leaking on
right rear brake drum but did find and correct a leak
hose that serviced the retarder, (8) that Mr. Howard,
of the complaining drivers, knew this work was perform
the truck, (9) that when the truck was put back into s
on the midnight shift on February 20, it had no defect
affecting safety, (10) that Mr. Johnson one of the com
drivers drove the truck during that entire shift witho
adjusting the brakes, (11) when Mr. Warnecke the day s
driver took the truck over at 7:00 a.m. the morning of
Wednesday, February 20 he found the brakes were in nee
adjustment, (12) that Mr. Johnson was known to drive a
excessive speeds and to ride the brakes instead of usi
retarder in order to move his loads faster, (13) that
foreman Goodman approached Mr. Warnecke and asked him
brakes were adequate at about the time he, Mr. Warneck
decided to take the truck to the repair shop for a bra
adjustment, (14) that the inspector Mr. Ryan arrived o
mine site around 7:00 a.m., announced he was there to
gate a complaint from the union about the truck and as
for the union representative, Mr. Mathes, (15) that wh
told Mr. Mathes was not there Mr. Ryan left the mine s
find Mr. Mathes, (16) that when the inspector returned
an hour later he found the truck parked at the repair
awaiting a brake adjustment, (17) that without making
static check of the condition of the brakes, the inspe
Mr. Ryan, directed the driver Mr. Warnecke to drive hi
the loading area, (18) that Mr. Ryan directed Mr. Warn

These undisputed facts lead me to concur in the applicants' claim that there never was any credible evidence tha applicants failed to act in a responsible manner to correct the claimed defect affecting safety; that the defect claime did not, in fact, affect safety either because it did not exist, or if it did, it was not serious enough to affect safety; that the retarder and other failsafe mechanisms described by Mr. Weigenstein were unaffected by the claimed oil leak; that the inspector, the investigator and the Secretary's trial counsel knew or should have known that th witnesses Warnecke and Weigenstein would testify that as a result of the complaint on February 15 corrective action wa promptly taken; that no amount of corrective action could offset the drivers' bad driving habits; that the brakes ran hot because the complaining drivers operated the truck with a reckless disregard for their own safety; that the failure to take statements from the witnesses Warnecke and Weigenst was not justified since both were material witnesses of applicants claimed dereliction and, in fact, Mr. Weigenstei was charged with the same dereliction.

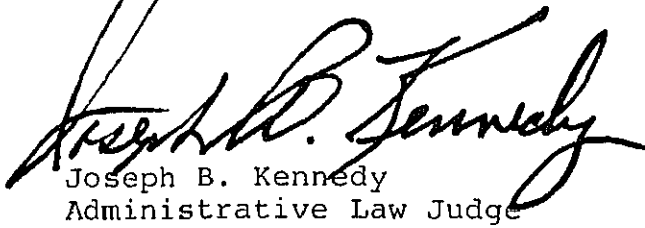
Accordingly, I conclude there was (1) no credible evidence that applicants knew or should have known the truc was being operated with a defect affecting safety, (2) no probative evidence that the truck was at any time operated with a defect affecting safety, and (3) in the exercise of due diligence the Secretary and his duly authorized representatives including his trial counsel knew or should have known this.

In view of the oversights and deficiencies in the agency investigation and prosecution of this matter, I find there was no substantial justification for the agency to believe it could prove the underlying violation or applican participation therein.

Order

The premises considered, it is ORDERED that the applic tion for award of attorney fees and expenses be, and hereby

is DENIED. It is FURTHER ORDERED that, there being no objection of record to the amount of fees claimed by Mr. Daly the Department of Labor pay attorney fees in the amount of $15,600 to Patrick E. Daly on or before Tuesday, August 30, 1983.



Joseph B. Kennedy
Administrative Law Judge

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MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Docket No. CENT 82-31-M
	:	A.C. No. 41-00059-05013
v.	:	
	:	Ogden Quarry & Plant Mine
SERVTEX MATERIALS COMPANY, Respondent	:	

DECISION

Appearances: James J. Manzanares, Esq., Office of the Solicitor
U. S. Department, Dallas, Texas,
for Petitioner;
Ed S. Chapline, III, Esq., Dallas, Texas,
for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges respondent, Servtex Materials Company, (Servtex), with violating five safety regulations promulgated under th Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq. (the "Act"

After notice to the parties, a hearing on the merits was held in Antonio, Texas on November 30, 1982.

The parties filed post trial briefs.

Issues

1) Is the Secretary estopped from issuing citations for safety violations when no citations for the same conditions were issued duri previous inspections?

2) If not, did respondent violate the regulations?

3) If a violation occurred, what penalties are appropriate?

errera and other MSHA inspectors had not resulted in the issuance of itations for the violations charged in this case (Tr. 71). Petitioner seeks n order affirming four citations and proposed civil penalties. Petitioner lso moved to vacate one of his citations.

Discussion

Failure of MSHA to issue citations at previous inspections.

As a threshold matter Servtex contends the citations are invalid. This efense arises from the fact that on 53 prior inspections no citations were ssued on these conditions. Servtex suggests that Herrera's issuance of itations for newly noticed safety violations demonstrates an incorrect use f subjective standards and a minimal understanding of the operation and unction of the machinery involved. Servtex further contends that an perator must rely, in part, on the results of previous inspections to etermine the efficiency of its compliance with safety regulations.

Servtex's arguments lack merit. The evidence of record does not support ervtex. Further, the case law is contrary to that view. Generally, an perator's reliance on prior inspections does not estop the Secretary from ringing an action on newly discovered safety violations. Midwest Minerals, nc., 3 FMSHRC 251 (January 1981)(ALJ); Missouri Gravel Co., 3 FMSHRC 1465 June 1981)(ALJ). Furthermore, Inspector's Herrera's 27 years of mine safety xperience, and an additional seven and a half years as a MSHA inspector ardly suggest lack of knowledge and experience in dealing with mine achinery and related safety issues (Tr. 10, 11).

/ Section 104(a) provides in pertinent part:

If, upon inspection or investigation, the Secretary or his authorized epresentative believes that an operator of a coal or other mine subject to his Act has violated this Act, or any mandatory health or safety standard, ule, order, or regulation promulgated pursuant to this Act, he shall, with easonable promptness, issue a citation to the operator. Each citation shall e in writing and shall describe with particularity the nature of the iolation, including a reference to the provision of the Act, standard, rule, egulation, or order alleged to have been violated. In addition, the itation shall fix a reasonable time for the abatement of the violation.

Herrera testified that a six inch coupling connects and lies between V-belt drive shaft and the transmission. While the coupling on the drill only 18 inches from a walkway, it is separated from the walkway by a guar for the V-belt drive; the guard is 14 to 15 inches high. The area is fur enclosed by a hand rail (Tr. 52).

Petitioner claims that a serious or fatal accident could occur if a miner were to become entangled in the coupling due to a fall or in the performance of maintenance duties (Tr. 21).

In conflict with such testimony, Servtex claims that the coupling wa enclosed in a box-type guard, and was effectively separated from the walk by the 24 inch V-belt drive guard (Tr. 33). In addition, witness John Fa (assistant plant manager) testified that an injury due to the coupling is unlikely. The coupling moves only when the transmission is engaged by th drill operator in the cab. In addition, the coupling is not serviced or repaired while the drill is in operation (Tr. 87, 88).

I accept MSHA's evidence but a fair reading of the record and a study the drawing (P6) establishes that this coupling was guarded by location. Section 30 C.F.R. 56.14-1 only requires guarding when the moving parts "ma be contacted by persons ..." It follows that when the Secretary charges a violation of Section 56.14-1 he must show that the unguarded part may be "contacted by persons." Kincheloe & Sons, Inc., 2 FMSHRC 1570 (June 1980)(ALJ).

In Applegate Aggregates 2 FMSHRC 2403 (August 1980) I vacated a citat charging a violation of Section 56.14-1. In that case the unguarded machi part was in a location where it was unlikely that a worker would come in contact with it; further, a guard rail prevented ready access to the part; in addition, the equipment was shut down when maintenance was performed.

2/ The cited section, 30 C.F.R. 56.14-1, provides as follows:

> Mandatory. Gears; sprockets; chains; drive, head, tail and takeup pulleys; flywheels; couplings; shaft; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded.

decision (Tr. 8).

Citation 174569

This citation alleges a violation of Title 30, C.F.R., Section 56.14-3. [3]/

The citation was issued for an insufficient guard at the head and pulley on a reversible conveyor at Servtex's plant. Herrera testified the guard extended eight inches above the pulley's top pinch point. Bu bottom pinch point was exposed as the pinch point was 3 1/2 feet beneat bottom of the guard. The exposed pinch point was adjacent to a walkway 72, Exhibit P7).

Herrera stated that both pinch points subjected miners to potentia dangers. The guard extending above the pulley was felt to be inadequat because the conveyor belt was smaller than the pulley, thereby creating exposed pinch point. A person performing service duties or removing de from the top of the conveyor could therefore be caught (Tr. 30). The unguarded pinch point on the bottom of the pulley (and adjacent to the walkway) exposed miners to potentially serious injuries should they fal reach into the area (Tr. 29).

Servtex offered evidence that the space between the shaft of the p and the walkway was a distance of 20 to 24 inches and that the radius o pulley was approximately nine inches (Tr. 89, 100). I find additional

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3/ The cited section 30 C.F.R. § 56.14-3 provides as follows:
Mandatory. Guards at conveyor-drive, conveyor-head, and conveyor-tail pulleys shall extend a distance sufficient to prevent a person from accidentally reaching behind the guard and becoming caught between the belt and the pulley.

I find from MSHA's evidence that: the bottom pinch point was approximately 27 inches below the guard, and 15 inches above the walkway. 5/ I therefore accept MSHA's evidence that the bottom pinch point on the pulley was unguarded. The unguarded pinch point, adjacent to a walkway, posed a foreseeable hazard to a miner's safety. It was readily accessible to mine in the normal course of their duties, and was not indirectly guarded by location. A previous case has upheld a citation issued for a similar condition. Central Pre-Mix Concrete Co., 1 FMSHRC 1424 (September (1979) (ALJ). Citation 174569 should be affirmed.

Citation 174575

This citation also alleges a violation of a mandatory safety standard 30 C.F.R. Section 56.14-3. 6/ Servtex is charged with failing to provide an adequate head pulley guard.

Inspector Herrera testified that the 4 1/2 foot pulley guard extended ten inches above the pinch point created by the pulley and conveyor belt (58, 65). The width of the conveyor belt was smaller than that of the pull creating an exposed area on each end of the pulley of about four inches (T 34, 35). Such a situation created two pinch points and made the guard les effective than it would have been if the conveyor belt and guard were directly adjacent to one another (Tr. 29, 34). The pulley was surrounded three sides by a walkway (Tr. 35). Serious injuries could be suffered sho a miner fall against the exposed part of the pulley, or reach in and be caught in the pinch point (Tr. 35).

4/ Respondent also claims that the bottom of the pulley and the lower pin point extend below the walk way, and that both pinch points were covered b guard (Tr. 89).

5/ Figures are derived from the following measurements:
(a) Distance from guard to walkway = 42"
(b) Distance from shaft of pulley to walkway = 24"
(c) Radius of pulley = 9"
(d) Distance between walkway and bottom of pulley (and pinch point) = (b)-(c) = 15"
(e) Distance from bottom of guard and pinch point = (a)-(d) = 27".
(Transcript at 72, 89, 100, P7).

the pinch points is "extremely unlikely" and that deliberate acts of reac over the guard cannot be prevented.

I disagree with Servtex's construction of the evidence. It is true it is unlikely that a miner would reach behind the guard and be caught in pinch point. But in the unguarded area contact could readily be made. Exhibit P8 illustrates this point. A photograph of a pulley guard offere Servtex (Exhibit R11) does not alter my conclusion, since statements made during the hearing suggest that the pulley guard depicted in the photogra was not the one cited by Herrera (Tr. 68).

The Commission case law establishes that where a miner can become en tangled in pinch points during the ordinary course of duties then the citation should be affirmed. Belcher Mine, Inc., 5 FMSHRC 584 (March 198 (ALJ); Central Pre-Mix Cement Co., 1 FMSHRC 1424 (September 1979)(ALJ).

Therefore, I accept Herrera's assessment of the hazard involved with head pulley guard. The potential of entanglement in the pinch point, eve though "extremely unlikely," does exist. Accordingly, Citation 174575 sh be affirmed.

This is an appropriate place to discuss the factual differences betw Citation 174561 and the remaining guarding citations. In citation 174561 Exhibit P6 shows the coupling in this citation to be guarded by location. would virtually be impossible for a miner to be exposed to the hazard of unguarded coupling. On the other hand, exposed pinch points in the other citations are not so guarded. In sum, the later violative conditions exp a miner in the ordinary course of his work to the hazard of entanglement.

Citation 174573.

This citation charges respondent with a violation of Title 30, C.F.R Section 56.12-67, 7/ due to an allegedly inadequate transformer fence.

The uncontroverted evidence establishes the following facts:

The fence around the transformer was 6 to 6 1/2 feet high (Tr. 39, 9

7/ The section provides as follows:

> Mandatory. Transformers shall be totally enclosed, or shall be placed at least 8 feet above the ground, or installed in

of debris that had accumulated against the transformer fence effectively reduced the fence's height to less than 6 feet. Therefore, Citation 1745 was properly issued, and it should be affirmed.

Civil Penalties

Petitioner proposes the following civil penalties for the three citations that are to be affirmed:

Citation	174569	$98
	174573	60
	174575	44
	Total	$202

Section 110(i) [now 30 U.S.C. 820(i)] of the Act sets forth six crit to be considered in determining civil penalties:

> In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

Concerning prior history: The MSHA computer printout indicates that Servtex was assessed 22 violations from June 1979 to the beginning of Jun 1981 (Exhibit P1). Fifteen citations were issued during June 1981, four which are at issue in this case (Tr. 15).

Concerning size: Servtex is a medium-sized operator. The evidence indicates that 105 people are employed at Servtex's Ogden Quarry and Plan The number of man-hours worked was approximately 54,605 hours for the fir quarter of 1981 (Tr. 42, 43).

Concerning negligence: The violative conditions should have been obv to the operator.

Concerning the effect on operator's ability to continue in business: This is essentially an affirmative issue to be established by the operato Buffalo Mining Co., 2 IBMA 226 (1973). Since no argument was advanced by Servtex that payment of the proposed penalties would impair its ability t continue in business, I assume that no such adverse affect will be suffer through payment of assessed penalties.

The Solicitor and Servtex's counsel filed detailed briefs which ha been most helpful in analyzing the record and defining the issues. I h reviewed and considered these excellent briefs. However, to the extent are inconsistent with this decision, they are rejected.

Based on the findings of fact and conclusions of law herein, I ent the following:

ORDER

1. Citations 174561 and all penalties therefor are vacated.

2. Citation 174568 and all penalties therefor are vacated.

3. Citation 174569 and the proposed penalty of $98 are affirmed.

4. Citation 174573 and the proposed penalty of $60 are affirmed.

5. Citation 174575 and the proposed penalty of $44 are affirmed.

6. Respondent is ordered to pay the sum of $202 within forty (40) of the date of this order.

John J. Morris
Administrative Law Judge

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RAY WARD, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. SE 82-55-D
v.	:	
	:	BARB CD 81-38
VOLUNTEER MINING CORPORATION, Respondent	:	

DECISION

This proceeding was brought by the Complainant under section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., seeking relief for alleged acts of discrimination. The case was heard at Knoxville, Tennessee.

Having considered the contentions of the parties and the record as a whole, I find that the preponderance of the reliable, probative, and substantial evidence establishes the following:

FINDINGS OF FACT

1. At all pertinent times, Respondent operated an underground coal mine that produced coal for sale or use in or substantially affecting interstate commerce.

2. Complainant was hired at Respondent's mine on October 30, 1978, as an operator of a continuous miner, a machine used to extract coal, and operated such equipment until April 10, 1981. On that date, Complainant was temporarily assigned to relieve a roof-bolter

supervisor that he was leaving the mine to talk to the mine superintendent, Everett Davidson, because Complainant needed to see a doctor about his pain.

3. He told Davidson that he needed to see a doctor because of stomach pains and that he was upset about being assigned to the roof bolter without training. Davidson denied him sick leave and told him that, as far as Davidson was concerned, Complainant had quit his job. Complainant saw a doctor for examination and treatment and later that day, April 10, reported the job incident to the local office of the Mine Safety and Health Administration, United States Department of Labor (MSHA).

4. When Complainant reported for work the following Monday, April 13, and was denied employment, Complainant filed a discrimination complaint with MSHA under section 105(c)(1) of the Act This complaint was settled by an agreement to reinstate Complainant with back wages for 108 hours. Complainant interpreted the agreement as a right to be reinstated in his regular position, continuous miner operator, but the written agreement did not specify position in which he was to be reinstated.

5. Complainant was reinstated on April 29, 1981. His superviso told him that, since McKamey was still on sick leave, Complainant would be assigned to roof bolter until McKamey returned, and the

laid off a number of miners, including Complainant, for the stated reason that the section where they were working was being closed and some time would be needed before a new section would open.

7. All of the miners on Complainant's shift who were laid off were later rehired except Complainant, and an additional employee was hired after the layoff. The miners on Complainant's shift who were rehired were: Paul McKamey, rehired on August 3, 1981, Herman Carroll, rehired on August 3, 1981, Joe Ward, rehired on August 10, 1981, and Hoyle West, rehired on August 17, 1981. Bayless Phillips, (a prior employee), who was not employed at the time of the layoff, was hired on August 17, 1981. During the layoff, Complainant asked Davidson for reinstatement but was not rehired; instead, Davidson told him that he could not tell when or if he would be rehired and recommended that Complainant seek employment elsewhere.

8. The layoff on July 10, 1981, was the only layoff at the mine in the time Complainant was employed there. The record does not indicate whether or not there had been a layoff at the mine before Complainant's employment.

9. At all pertinent times, Respondent's employees did not have a collective bargaining agreement. Respondent paid all non-supervisory miners the same rate, regardless of position or length of employment with Respondent.

> (c) (1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

This section protects a miner from discrimination because of safety complaints or his exercise of other rights under the statute.

Complainant's complaint to Respondent's mine management on April 10, 1981, and to MSHA later that day, because of his assignment to run the roofbolter without adequate training, was a protected activity under section 105(c)(1) of the Act. His discrimination complaint on April 13, 1981, filed with MSHA under section 105(c)(1) of the Act, was also a protected activity under that section.

Complainant's regular job with Respondent, for over 2 1/2 years, was a continuous miner operator. He was hired for that position on October 30, 1978, and performed this skilled position without incident or any problem until April 10, 1981.

His first discrimination complaint was settled by

temporary assignment to relieve Paul McKamey as roof bolter until McKamey returned from sick leave. Complainant's supervisor, Otis Cross, stated that this assignment would be only a few days, since McKamey was expected to return to work in a few days.

The circumstances of the temporary assignment on April 29 raise a suspicion of a discriminatory intent to penalize Complainant because of his prior safety and discrimination complaints. Respondent did not show a legitimate business reason for this temporary assignment, to explain why Complainant could not have reasonably been reinstated as a continuous miner operator and another employee assigned to the job of roof bolter until McKamey's return.

However, without resolving whether the April 29 temporary assignment was discriminatory, I conclude that the permanent assignment of Complainant as a roof bolter helper, on or about May 4, 1981, was discriminatory.

When McKamey returned in a few days, on or about May 4, 1981, Respondent did not return Complainant to his regular position of continuous miner operator but, instead, made him a permanent roof bolter helper. I find that this assignment was discriminatory, and motivated by an intention to retaliate against Complainant because of his exercise of his rights under the statute on April 10 and April 13, 1981. Respondent offered no credible business explantion for its

as a continuous miner operator helper was contrary to Respondent's practice of assigning two qualified continuous miner operators on the same shift, so that they could take turns as miner operator and helper in order to achieve the best production. Complainant was a qualified miner operator, and had worked effectively with Joe Ward, another qualified miner operator, as a team for over two years and nine months -- rotating with him as operator and helper. The disturbance of this assignment of the two miner operators, by moving Carroll to miner operator helper, displaced Complainant from his regular position with no showing of a legitimate business reason for this job change. I find that the permanent assignment of Complainant as a roof bolter operator or helper was discriminatory. In addition, I find that Davidson demonstrated a discriminatory intent toward Complainant by his hostility in not talking to Complainant at various times when Complainant greeted him after Complainant's reinstatement. This hostility is consistent with, and is further evidence of, an intention by Davidson to discriminate against Complainant because of his prior discrimination complaint and safety complaint.

The layoff on June 10, 1981, was for the purported reason that the section where complainant's shift was mining was being closed and some time was needed before a new section would be opened. This decision by Respondent was different from past practices, in that

off Complainant's shift on July 10 raises a suspicion of a discriminatory intent to use the layoff as a means of discharging Complainant. However, without resolving whether the layoff was discriminatory, I conclude that the decision not to rehire Complainant after the layoff was motivated by an intention to discriminiate against him because of his prior discrimination complaint and safety complaint. Everyone on Complainant's shift who was laid off was later rehired except Complainant, an additional employee was hired in preference to Complainant, Complainant requested but was denied reemployment during the layoff, and Respondent provided no credible, legitimate business reason for its failure to rehire Complainant. In addition, as discussed above, there was discriminatory treatment of Complainant before the layoff.

Complainant has not met his burden of proof on the charge that Respondent violated section 105(c)(1) by denying him the opportunity to work overtime after April 29, 1981. His proof raises a suspicion of a discriminatory intent to deny him overtime opportunities after April 29, 1981 1/, but Complainant did not prove sufficient facts to

1/ The employment records show that, prior to April 29, 1981, Complainant worked overtime an average of about one week a month but he worked no overtime from the time of his reinstatement on April 29, 1981, until his layoff on July 10, 1981; a number of employees worked overtime both before April 29, 1981, and in the period from April 29, 1981, until July 10, 1981.

CONCLUSIONS OF LAW

1. The judge has jurisdiction over this proceeding.

2. Respondent violated section 105(c)(1) of the Act by failing to assign Complainant to his regular position of continuous miner operator on or about May 4, 1981, when Paul McKamey returned from sick leave.

3. Respondent violated section 105(c)(1) of the Act by failing to reemploy Complainant on and after August 3, 1981, when the other employees on layoff were reemployed, and on August 17, 1981, when Bayless Phillips was employed.

4. Complainant has not met his burden of proof on the charge that Respondent violated section 105(c)(1) of the Act by denying Complainant the opportunity to work overtime after April 29, 1981.

5. Complainant is entitled to reinstatement, back pay with interest, a reasonable attorney's fee and costs, and such other relief as may be deemed equitable and just.

Proposed findings of fact and conclusions of law inconsistent with the above are rejected.

PENDING A FINAL ORDER

Jurisdiction of this proceeding is retained by the judge pending a final order for relief. Counsel for the parties should confer in an effort to stipulate the amounts and other relief due under this

will be held on issues relevant to relief.

William Fauver
Administrative Law Judge

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: Sunrise Mine & Mill
C F & I STEEL CORPORATION, :
Respondent :

DECISION

Appearances: Robert J. Lesnick, Esq., Office of the Solicitor
U. S. Department of Labor, Denver, Colorado
for Petitioner;
Allan R. Cooter, Esq., Pueblo, Colorado
for Respondent.

Before: Judge Carlson

The Secretary of Labor petitions this Commission for the affirmance o penalty assessed against C F & I Steel Corporation (CF&I) for the allege violation of 30 C.F.R. § 57.19-124, (1982) a safety regulation promulgate under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq. (19 and Supp. 1982). The cited regulation provides as follows:

> Mandatory. Hoist ropes other than those on friction hoists shall be cut off at least six (6) feet above the highest connection to the conveyance at time intervals not to exceed one (1) year unless a shorter time is required by standard 57.19-126, or by conditions of use. The portion of the rope that is cut off shall be examined by a competent person for damage, corrosion, wear and fatigue.

After notice to the parties a hearing was held on February 2, 1983, Denver, Colorado. The parties stipulated to all the material facts. Cer of the stipulations were oral; others were based upon agreement that all factual representations contained in the pleadings and supporting document already in the file were true. Both parties submitted post-hearing briefs

THE FACTS

The material facts as revealed by the stipulations may be summarized follows:

(1) CF&I's Sunrise mine is subject to the coverage of the Act.

(2) The Sunrise operation is large with an average history of citations.

normal operating use.

(6) The rope was last replaced on June 20, 1980.

(7) On January 21, 1982, while CF&I's petition for modification was pending, a representative of the Secretary inspected the mine and issued a citation for violation of 30 C.F.R. § 57.19-124.

(8) In the year prior to inspection CF&I did not cut and examine the rope as required by 30 C.F.R. § 57.19-124.

(9) At no time prior to the hearing did CF&I file an application for interim relief under 30 C.F.R. § 44.16 et seq.

(10) On March 18, 1982, CF&I received notice that its petition for modification was denied.

(11) CF&I exercised good faith in abating the violation shortly after receiving the inspection citation.

ISSUE

Does the pendency of a petition for modification, filed in good faith abrogate or limit the Secretary's authority to issue a valid citation for violation of the standard from which the petitioner seeks relief?

DISCUSSION

CF&I sought its modification of the hoist rope standard because the hoist in question received less-than-normal use and the hoist rope would therefore suffer less-than-ordinary wear. In defense against the Secretary charge, CF&I basically argues that it was improper for the Secretary to is the citation for violation of 30 C.F.R. § 57.19-124 because it had a petit for modification pending on that very regulation. Because of its good fai in pursuing a variance in the application of the standard to the hoist in question, and a reasonable expectation that it would ultimately be granted CF&I contends it should not be subject to a citation while a decision on t modification request was pending.

In this present proceeding CF&I suggests that its original petition f
modification is the equivalent of an interim application, or includes one
implication. The argument cannot prevail. The provisions of 30 C.F.R. 44
require extensive special showings of fact beyond those specified for a
petition for modification. Specifically, 30 C.F.R. § 44.16(e) provides:

> Before interim relief is granted, the applicant must clearly show that (1) the petition seeking modification has been filed in good faith, and the applicant is not using the proceeding solely to postpone or avoid abatement; (2) the requested relief will not adversely affect the health or safety of miners in the affected mine; and (3) there is a substantial likelihood that the decision on the merits of the petition for modification will be favorable to the applicant.

According to 30 C.F.R. § 44.16(d) these representations must be set out an
supported in the application. In addition to the more burdensome special
showings required, the interim relief mechanism provides procedural safe-
guards to insure that the enforcement powers of the Secretary are not
suspended by unilateral action on the part of a petitioning party, to the
possible detriment of the safety of miners. Section 44.16(f) allows all
parties three days in which to respond to the interim application, and
44.16(h) allows for speedy hearings upon any of the issues raised. Thus,
regulations make a clear distinction between a petition for modification a
an application for temporary relief. The former proceeds through the vari
procedural phases outlined in the Secretary's regulations in a way which d
not affect the interim enforceability of the standard in question. On the
other hand, the operator seeking temporary relief must supplement his
modification efforts by special showings and must be prepared for a speedy
hearing in which the facts pertaining to all issues may be aired in an
adversarial setting. Only in this way can there be a reasonable assurance
that the safety or health of miners will not be jeopardized by a precipito
and unwarranted suspension of the Secretary's enforcement duties. In short
the difference between the petition for modification and the application f
interim relief is one of substance, not mere nomenclature or form. For th
reason, CF&I's petition for modification cannot be construed to embody an
implied request for interim relief.

CF&I places much emphasis upon its good faith approach to the hoist
problem, and its reasonable expection of success in its quest for a

application was filed, and that oversight cannot be remedied in this prese penalty proceeding.

Similarly, it is not material that the petition for modification was prepared pro se. It is likely true that had the company been aided by counsel an application would have been filed. Pro se status, however, can transform a petition for modification into an application for interim reli

A further matter deserves note. After the hearing, CF&I submitted copies of correspondence showing that the company had asked the Secretary further consideration of its modification request in view of MSHA's propos to eliminate the part of the standard which requires cutting of the rope f examination. A letter to CF&I's General Superintendent by MSHA's Administrator for Metal & Nonmetal Mines dated March 14, 1983 appears to waive th cutting requirement for March 29, 1983. This correspondence cannot influe the outcome of this present proceeding. First, it was submitted after the factual record was closed, and was accompanied by no motion to reopen the record. Second, even if given consideration, MSHA's later action as to respondent's 1983 responsibilities does not alter the previously discussed legal precepts which govern the resolution of the issue before me.

PENALTY

The parties stipulate that if CF&I does not prevail upon the legal is presented here, the $90.00 proposed by the Secretary should be affirmed (T 4). Since I find the citation valid, and conclude that the $90.00 propose penalty accords with the statutory criteria set out in section 110(i) of t Act, CF&I shall be required to pay a civil penalty of $90.00

ORDER

CF&I is therefore ordered to pay to the Secretary a civil penalty of $90.00 within 30 days of this decision.

John A. Carlson
Administrative Law Judge

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